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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

19 CR 850 (JSR)

5 PARKER H. PETIT AND WILLIAM
6 TAYLOR,

7 Defendants.
8 -----x

New York, N.Y.
November 13, 2020
10:30 a.m.

9 Before:

10 HON. JED S. RAKOFF,

11 District Judge
12 and a Jury

13 APPEARANCES

14 AUDREY STRAUSS,
Acting United States Attorney for the
15 Southern District of New York
SCOTT HARTMAN
16 EDWARD IMPERATORE
DANIEL TRACER
17 Assistant United States Attorneys

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20 -AND-

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21 BY: MATTHEW I. MENCHEL
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23 BY: WILLIAM WEINREB
24 WILLIAM BURCK
MICHAEL PACKARD
25 DANIEL KOFFMANN

KBD3PET1

(In open court; jury not present)

THE COURT: We have not yet heard from the juror who had the remote appointment starting at 9 a.m. and that's a little disconcerting. My own thought, though I want to hear from counsel, is that if for any reason we haven't heard from her by, say, 11:15, we should replace her with the next alternate. And the reason is, I know from what she told my courtroom deputy, it takes her about a half hour to get here. I don't see how, consistent with our schedule and the plans of counsel, we could start the next summation any later than 11:45. But let me hear what counsel think about all that.

MR. PACKARD: May we have one moment to confer?

MR. BRUCE: You may have said it earlier. Which juror number was she?

THE COURT: This is Juror No. 4.

MR. BRUCE: Thank you.

(Pause)

THE COURT: Okay? So what's the government's view?

MR. IMPERATORE: We take no position, your Honor.

THE COURT: That's so brave of you.

What's the defendants' view?

MR. BURCK: We have to make sure we have consensus.

MR. MENCHEL: Have we heard from this juror?

THE COURT: I'm sorry?

MR. MENCHEL: I am coming a little late to this party.

KBD3PET1

1 Have you heard from the juror?

2 THE COURT: No, that's why I'm concerned. Because her
3 appointment began at 9 a.m. We told her to call us as soon as
4 the appointment was over so we would know when she would be
5 arriving here. She has not yet called.

6 So, she made clear from day one that this was a very
7 important appointment in her life, and it was only with some
8 diplomacy we were able to get her to move it to a 9 a.m. time.
9 So, I'm not going to artificially put any pressure on her to
10 end it or whatever. Social Security Administration, in my
11 experience, can take five minutes or five hours. This is known
12 as federal bureaucracy.

13 So, my suggestion, but very much subject to hearing
14 from counsel, is that if she has not called by 11:15, meaning
15 she won't be here until 11:45 or later, that we excuse her and
16 substitute the next alternate, both because of our schedule,
17 but also because it's really not fair to all those other jurors
18 to just leave them sitting there for an hour or more. So
19 that's my suggestion.

20 MR. BRUCE: Your Honor, if I may. Did you have a hard
21 stop today at 1 o'clock?

22 THE COURT: I have to give a speech from 1 to 2. And
23 for reasons we've discussed many times, I don't think it's
24 right to keep the jury beyond 3:45, because they need to get
25 home before rush hour.

KBD3PET1

1 So, I know defense counsel, if I recall correctly,
2 were anxious to have everything done today, including the
3 government, and I'm very much in agreement with that. So
4 that's another factor to factor in.

5 MR. MENCHEL: I'm less concerned about that, your
6 Honor, than just I want -- I was allotted two hours, and I know
7 I told you I was going to try to chisel it down, but I think
8 I'll need the full two hours.

9 THE COURT: If we haven't heard from her, then we
10 could start at about 11:20. And you would have to break your
11 summation into two parts.

12 MR. MENCHEL: That's fine. Can we just confer?

13 THE COURT: Yes.

14 (Pause)

15 MR. BURCK: That's fine with the defense.

16 THE COURT: Very good. All right.

17 Now let's deal with the only open legal issue, which
18 is this question of in connection with. So, I took a look at
19 the relevant case law, and it seems to me clear that if someone
20 holds a security that they otherwise would at least consider
21 selling, if they had known the information that they did not
22 know because of the alleged fraud, that that also qualifies in
23 connection with a purchase and sale.

24 In that regard, take a look at *United States v.*
25 *Ebbers*, 458 F.3d 110, 127 (2d Cir. 2006); *United States v.*

KBD3PET1

1 *Contorinis*, 692 F.3d, 136, 142 (2d Cir. 2012); *United States v.*
2 *Victor Teicher*, a decision of my colleague Judge Haight in the
3 Southern District of New York, reported at 1990 WL 29697;
4 *Castellano v. Young & Rubicam*, 257 F.3d 171, 180 (2d Cir.
5 2011); *O'Donnell v. AXA Equitable Life Insurance Company*, 887
6 F.3d 124, 129 (2d Cir. 2018); and various other cases.

7 So, I think we can do one of two things. I'll hear
8 from counsel. Either, if the defendant wants to rely on what
9 it says is evidence of other sales within the relevant period,
10 independent of any decision by the funds to hold on, that's
11 certainly an option. Then we don't have to change anything.
12 But I think, again, very much subject to hearing from counsel,
13 that an alternative, if you look at page 18 of the charge, top
14 paragraph, fourth line, beginning with the word "specifically,"
15 it presently says, "specifically the purchase or sale of MiMedx
16 stock," the proposal would be to add the words "or the decision
17 to hold on to the stock when, if the alleged fraud had been
18 known, the decision might have been otherwise."

19 So, let me hear from the government and then from
20 defense counsel.

21 MR. TRACER: Sure, your Honor. First of all, we would
22 request inclusion of that additional language in light of the
23 fact that that is I think one of our bases for the in
24 connection with. We did take a look at the transcript last
25 night, and we think there is actually multiple additional stock

KBD3PET1

1 sales that are in the record, so we won't be solely relying on
2 that. In particular, Government Exhibit 105 describes the
3 repurchase of shares by MiMedx during the relevant time period.
4 In addition, Government Exhibit 106 describes the exercise of
5 options, which are the purchase of securities, by various
6 insiders in the company during the relevant period, as well as
7 the investor testimony that actually talks about them adding
8 and trimming MiMedx stock during the relevant period, which is
9 a reference to buys and sells.

10 So, in light of all of that, we think there are both
11 purchases and sales in the record, but we would add for that
12 language to be included as well as it is one of our bases.

13 THE COURT: You make one other point which
14 specifically the purchase or sale of MiMedx stock, I think we
15 should change that to securities, because a stock is only one
16 form of security.

17 MR. KOFFMANN: On behalf Mr. Taylor, we would oppose
18 the change to the instruction that your Honor just articulated.
19 We, notwithstanding the case law, which we haven't had an
20 opportunity to review in full, but we feel confident that that
21 instruction would be erroneous. So if the government wants to
22 rely on that theory and that instruction is in there, I
23 understand that.

24 THE COURT: I would think you would welcome this
25 because it's your legal position, as I understood it earlier,

KBD3PET1

1 that you don't think this is right. So, if the government is
2 relying on like the sales I just mentioned, also wants to rely
3 on this holding on theory, then if you're correct, you've got
4 an appellate issue right there, assuming arguendo there is a
5 conviction.

6 So, is it your position, you correct me if I'm wrong,
7 is you oppose this addition because you don't think it
8 accurately states the law, but if there is to be an addition,
9 while preserving your full appellate rights, you had no problem
10 with the wording otherwise. Do I have that right?

11 MR. KOFFMANN: I think so, your Honor. Fundamentally,
12 we think the instruction as it is now is accurate, and that the
13 change that you're proposing we believe would be inaccurate.

14 THE COURT: So, let me go back to the government. I
15 think it's totally your choice. You take your chances if -- I
16 must say, I thought the case law was, when I looked into it,
17 fairly overwhelming on this issue, but it's only Second Circuit
18 law. I've heard that the Supreme Court has authority, even
19 over the Second Circuit.

20 So, what's your choice?

21 MR. TRACER: We do want it, your Honor. We would ask
22 it be kept in, the suggestion.

23 THE COURT: So I'll just read it one more time and
24 we'll conform the jury instructions accordingly. This is on
25 page 18, fourth line down. Beginning with the word

KBD3PET1

1 "specifically." It will now read, "Specifically, the purchase
2 or sale of MiMedx securities, or the decision to hold on to the
3 securities where, if the alleged fraud had been known, the
4 decision might have been otherwise."

5 MR. BRUCE: We object on the grounds you indicated
6 that we don't think it accurately states the law.

7 THE COURT: Yes.

8 MR. BRUCE: For Mr. Petit.

9 THE COURT: There is no issue you've clearly preserved
10 this issue for appeal.

11 THE DEPUTY CLERK: Juror No. 8 from the Bronx who is
12 always late is I expect two minutes from entering 11B at this
13 time.

14 There is no answer from Martha Delgado's phone she
15 gave me, and I don't know if that means she is afraid to put
16 Social Security on hold and pick it up, I don't know what it
17 means. I did ask her last night to call me when she was out
18 the door.

19 THE COURT: Counsel and I have agreed that if she
20 hasn't made contact with you by 11:15, we will replace her with
21 the next alternate and proceed. If she has made contact, of
22 course let us know.

23 THE DEPUTY CLERK: I will.

24 MR. KOFFMANN: While we are on the topic of
25 instructions, since we have a moment, we obviously saw the

KBD3PET1

1 instructions you handed out yesterday. And just one note on
2 instruction 12 where your Honor took out the reference to
3 collectibility of payments and made it broader to refer to all
4 four revenue recognition criteria. We had, during the charge
5 conference, we had handed up a black line with different
6 language. We understand your Honor didn't adopt that, but we
7 wanted to make sure it was in the record what we had proposed.

8
9 THE COURT: I think, by the way, although I think I
10 read most of what you had handed up into the record, feel free
11 to go ahead and docket all your proposed language so there will
12 be no question on appeal what it was that you proposed.

13 MR. KOFFMANN: Very well. We'll do that, your Honor.
14 Thank you.

15 THE COURT: So, we will reconvene at 11:15 unless we
16 hear from the juror.

17 MR. TRACER: Your Honor, just to suggest it. I think
18 at this point the government would also be comfortable, if
19 defense counsel wants and if the Court is amenable, if we don't
20 hear by 11, just given what we'd like to get done today. But
21 we defer to the Court.

22 THE COURT: No, I think we have to in fairness to
23 Juror No. 4 wait until 11:15.

24 MR. TRACER: Okay.

25 (Recess)

KBD3PET1

1 THE COURT: Let's reconvene.

2 We finally heard just a very few minutes ago from
3 Juror No. 4., and she was still in the interview with Social
4 Security. And Social Security was saying that it could go on
5 at least another half hour. So, I excused her, consistent with
6 what we had all discussed.

7 So we'll get the jury up right away and continue with
8 summations. Anything else we need to take up now? Very good.
9 We'll sit here until jury comes up.

10 MR. IMPERATORE: Just one question. If the defense
11 veers into this issue of uncalled witnesses and suggests that
12 witnesses should have been called, I understand the Court does
13 not currently have an instruction on that in the jury charge.

14 THE COURT: I indicated that if I thought it became an
15 issue, both I would say something right at the time, and also
16 that I would consider adding something to the jury
17 instructions. So, both those possibilities are very real
18 possibilities, as I made clear. And of course, on your
19 rebuttal summation you're free to state that the subpoena power
20 is available to both sides.

21 MR. BURCK: On that point, your Honor -- can you hear
22 me okay? We certainly do not intend to say anything close to
23 that there were witnesses who weren't called. We are going to
24 say, I think consistent with your guidance yesterday, that
25 there are aspects in which there is no evidence in the record

KBD3PET1

1 to explain what people thought.

2 THE COURT: That was the line I drew and, yes, that's
3 fine.

4 MR. BURCK: Thank you.

5 MR. MENCHEL: I am going for about an hour or so, and
6 if I want to end it?

7 THE COURT: Yes. You pick a time no earlier than
8 12:45, no later than 12:55. That's totally in your call.

9 MR. IMPERATORE: Your Honor, if we are doing the
10 rebuttal today, I just want to make sure we will preserve 45
11 minutes for that. Notwithstanding --

12 THE COURT: Not 46, but 45.

13 The jury is on their way up.

14 MR. MENCHEL: Is it your practice to give a two
15 minute, five minute warning or nothing like that?

16 THE COURT: Do you want me to?

17 MR. MENCHEL: I wouldn't mind. Five minutes. That
18 would be great. Thank you.

19 THE COURT: Okay.

20 (Jury present)

21 THE COURT: Ladies and gentlemen, thank you for your
22 patience. Because former Juror No. 4 was still in the
23 interview with Social Security, counsel and I agreed that we
24 needed to move forward, so we excused her. So former Juror 13
25 is now Juror No. 4. Congratulations. And I think everyone

KBD3PET1

Summation - Mr. Menchel

1 else is properly seated.

2 So, we are ready to hear from counsel for Mr. Petit.

3 MR. MENCHEL: Thank you, your Honor.

4 May it please the Court. Counsel for the government,
5 counsel for Mr. Taylor, ladies and gentlemen of the jury, good
6 morning.

7 I want to begin before I get into the actual closing
8 argument of just spending a moment or two to thank you for your
9 service in this case. Being a juror, as his Honor said, is an
10 extremely important service. It's vital to our system of
11 justice. And it's always an inconvenience to do so. You
12 sacrifice time away from work, your friends, your family, your
13 regular life. But I think under these circumstances, given
14 where we are in the world, it's even more extraordinary than is
15 normal. And on behalf of I can say all parties, I want to
16 thank you for your kind attention and service.

17 Mr. Hartman gave a very persuasive and compelling
18 closing argument yesterday, it was clear to me. But I would
19 ask your indulgence to still keep an open mind until you've
20 heard all arguments in this case, his Honor's instructions on
21 the law, and then you begin your deliberations. Because it
22 won't surprise you that we have a very, very different version
23 or view of what the evidence in this case actually showed.

24 A lot happened during these last several weeks, but
25 trials are far from perfect vehicles for absorbing information,

KBD3PET1

Summation - Mr. Menchel

1 particularly under these circumstances. Evidence comes in
2 drips and drabs, comes in a document here or a document there,
3 out of order, out of chronology. And I know the evidence in
4 this case, and I found it difficult to follow at times, so I
5 can only imagine that you all were struggling with it as well.

6 And while Mr. Hartman's close argument seemed
7 compelling, I submit to you that it suffers from two
8 fundamental flaws. First, from the very beginning of this
9 case, as we told you, in the government's opening statement,
10 three weeks ago, they have portrayed everything in this case,
11 every document, every action, every e-mail, as somehow
12 sinister, dirty, shady, no matter how innocuous and no matter
13 how innocent it is. And I'm going to show you multiple
14 examples of that today. Everything is supposedly a sham or a
15 secret or a side deal. You're led to believe that literally
16 nothing is simply as it appears to be. Basically, as Mr. Bruce
17 said, my colleague, in opening statement, and it's been proven
18 to be true, the government is looking at everything in this
19 case through a dirty window, a dirty prism, if you will, and
20 therefore they see everything as dirty.

21 This is what Mr. Tracer said right from the very
22 beginning in his opening statement about the way MiMedx sells
23 its products. He said, "They don't wait to receive the money
24 before recording revenue. They don't wait to be paid before
25 they record the revenue or before they show the money on their

KBD3PET1

Summation - Mr. Menchel

1 books. Again, MiMedx didn't wait."

2 Now, if you were sitting listening to this for the
3 first time, as you were, it sounds like MiMedx was doing
4 something wrong. That they should have been waiting before
5 they could recognize the revenue, they should have been waiting
6 to get paid. This is a perfect example of what I'm talking
7 about. Next slide, please.

8 In reality, what MiMedx does in the way it books its
9 revenue is standard industry practice. We brought that out
10 through Mark Andersen at the very beginning. It's called
11 accrual-based accounting, and there is absolutely nothing wrong
12 with it, as Mr. Andersen himself said right from the very
13 beginning. In fact, in the second question, he is asked: It
14 is the default way to actually account for sales under the
15 generally accepted accounting principles, correct?

16 Answer: Yes, it is a way for all transactions, yes.

17 It is a perfect example of what I'm talking about.
18 There was something sounding nefarious or sinister because
19 MiMedx didn't wait to book its revenue until it got paid. When
20 no company, no publicly traded company, does that in the normal
21 course.

22 Another example, you heard from Mr. Martin at
23 Stability. Right. And they brought out multiple times that
24 Mr. Petit asked for a \$2 million order, as though somehow when
25 somebody wants to become a distributor for MiMedx, and MiMedx

KBD3PET1

Summation - Mr. Menchel

1 says, great, you want to become a distributor, we want you to
2 buy our product, that that's wrong. That that's dirty. Folks,
3 that's the whole point of becoming a distributor, is you buy
4 the product from the manufacturer, you essentially act as a
5 middleman, as the government said, and you sell it. There is
6 absolutely nothing wrong with Mr. Petit or anybody at MiMedx
7 going to one of its distributors and saying we'd like you to
8 purchase X amount of product this month. In fact, as you may
9 remember, there was testimony in this case that a number of the
10 consulting arrangements have an understanding that there will
11 be a minimum purchase amount each quarter. There is nothing
12 inherently wrong or sinister or evil about any of that.

13 I want to give you some other examples of typical
14 things that there is absolutely nothing wrong with that was
15 painted with a sinister gloss.

16 Setting of aggressive revenue targets and doing all
17 you can to hit them. That's what companies do. They set
18 aggressive targets and they shake the bushes and shake the
19 trees to get people to buy their product.

20 Telling your distributors what products they should
21 purchase. MiMedx is in this industry. They understand the
22 market. The distributors are middlemen for them. There is
23 absolutely nothing wrong with suggesting what products may take
24 off in a given market and what product might not.

25 Thinking that you can exchange products that a

KBD3PET1

Summation - Mr. Menchel

1 customer is having trouble selling, and that such exchanges are
2 revenue neutral. Actually makes a certain amount of common
3 sense. It may have been wrong as a matter of accounting in
4 this case, but you can see how most people would think, if I
5 exchange a red backpack for a blue backpack, that should be
6 revenue neutral, meaning it shouldn't have any impact on the
7 revenue number. This was a widely held belief at MiMedx.

8 Suggest to your distributors after months of back and
9 forth negotiations to sign a distribution agreement isn't
10 nefarious. That's what good business people do. They say can
11 you sign this. We've been going back and forth.

12 Allowing distributors to pay for product as they sell
13 it. You may recall Mr. Martin testified that's the way I
14 always do business. I don't have a lot of cash. I sell, and
15 then I pay the manufacturer for what I sold.

16 Asking distributors to pay down an account receivable
17 or paying for the product they bought. Is what you would
18 expect someone to do if it's been outstanding for several
19 months.

20 Making sales to a company you might acquire or
21 acquiring to which you've made sales. There has been no
22 evidence in this case that that's somehow wrong or improper at
23 all.

24 And connecting a potential investor, like Mr. Petit's
25 son-in-law, for an investment opportunity with SLR, there's

KBD3PET1

Summation - Mr. Menchel

1 nothing wrong with that either.

2 These are all many examples of the kind of sinister
3 gloss that's being put on normal, typical business behavior.
4 I'm going to talk about many other example as we go through.

5 I recall during Mr. Carlton's testimony there was a
6 moment when he was asked a question about organic or natural
7 demand. I don't know if any of you remember that, but there
8 was a question where he talked about something being natural or
9 organic demand. Folks, there was no evidence of what that even
10 means. They didn't even ask him to explain it.

11 All I can tell you is this. If companies want to stay
12 in business, they have to hustle. There is nothing wrong with
13 that. Apple, I think there are a billion iPhones in the world
14 right now that people have. They just came out with an iPhone,
15 they just came out with a new MacBook, and I'm seeing ads
16 everywhere, as I am sure you are. They are not sitting back on
17 their laurels and saying let's wait for the phone to ring.
18 They go out and they hustle. The day Apple stops doing that is
19 the day they fail. It's no different with MiMedx.

20 So the idea that Mr. Petit and others in the company
21 were you pushing their salespeople to sell, that's what you
22 would expect somebody who is the head of a publicly traded
23 company to do.

24 That's really sort of the point I want to make right
25 here. A courtroom is a very sterile environment. This is more

KBD3PET1

Summation - Mr. Menchel

1 sterile than normal, literally my air being sterilized as I'm
2 speaking to you. But it is a sterile environment where things
3 that you would never accept as true outside of this courtroom,
4 somehow take on a life. And that's why you are here. You are
5 here because you breathe real life back into this process.
6 What you know about life, business, common sense, life
7 experience, those are the tools you will use to evaluate the
8 evidence in this case. And when you do that, when you stop
9 just looking at everything as sinister, but actually start to
10 think and use your common sense, you'll see a very different
11 picture emerge from the evidence in this case.

12 That's the first thing that the prosecutors have done
13 a lot of, which is put a sinister gloss.

14 The second thing, and I am going show you this, is
15 they've been cherrypicking the evidence in this case. Only the
16 pieces, only the documents that fit their narrative. If a
17 document didn't fit their narrative, or if a witness said
18 something they didn't want to hear, it was ignored in that
19 closing argument.

20 I'm going to go through with you with the documents
21 they didn't put into evidence but that we did, and the
22 testimony that came out not on direct examination -- which I
23 submit to you was highly scripted and I'm going to prove that
24 to you during this closing -- but on the cross-examination,
25 when the witnesses were asked questions that they weren't

KBD3PET1

Summation - Mr. Menchel

1 expecting and therefore gave unscripted answers. Unrehearsed
2 answers.

3 So with that, let's start with CPM. What's the
4 government's theory about CPM? This is their theory about CPM
5 and the third quarter order that you've heard so much about.
6 CPM didn't want or need MiMedx product. By the way, that is a
7 constant mantra that we've heard in this case, right. Didn't
8 want, didn't need, couldn't sell. Didn't want, didn't need,
9 didn't sell. Martin was like a broken record with that. Okay.

10 Just to be clear, by the way, there has been no direct
11 evidence of what actually was in Mr. Brooks' own mind during
12 any of this. Okay. The only reason they claim that CPM
13 purchased this product was because he was bribed by Mr. Petit
14 to do so. And the bribe was in some form of secret \$200,000
15 payment that apparently no one was supposed to know anything
16 about, it was going to be paid through some kind of illicit
17 funds, through a shell company or through money in a bag we
18 heard about.

19 Let's look at the actual evidence in this case.
20 First, let's start with who Mark Brooks is and what we learned
21 about him. This was a difficult guy. If there was anything
22 that the witnesses from MiMedx agreed with, Mr. Schultz and
23 Mr. Carlton, is he was a difficult, tough guy to deal with. He
24 played games. He was always late to pay. He was always hard
25 to negotiate with, according to Mr. Carlton. And one of the

KBD3PET1

Summation - Mr. Menchel

1 things that you heard a lot of evidence about was he had a
2 tactic of waiting until the end of the quarter before placing
3 an order. Why? To get discounts, to get concessions, to get
4 free product. Now, they didn't like that. But that doesn't
5 make it a bribe because somebody says I'm not going to sell --
6 I'm not going to buy your product until I get those
7 concessions. He had them over a barrel, until there came a
8 point when they said we don't care anymore, we're done with
9 you.

10 The fact that Mr. Brooks held out for the things he
11 felt he was entitled to, and the fact that MiMedx and Mr. Petit
12 acquiesced to those things, doesn't make it a bribe.

13 It's tough business negotiation by CPM, no question.
14 But you haven't actually heard or seen any real evidence of a
15 bribe in this case at all. Next slide, please.

16 As I said, even Mr. Carlton agreed that CPM had a
17 history of waiting until the end of the quarter.

18 "Q. But it was typical of CPM to hold back until they got the
19 concessions they wanted before they would place an order,
20 right, they did that a lot?

21 "A. Painfully, yes."

22 What happened in the end of the third quarter was not
23 unusual. It was typical. As much as Mr. Schultz was like, we
24 were shocked and blown away, which, by the way, you'll see
25 contemporaneous documents showing not at all, this was

KBD3PET1

Summation - Mr. Menchel

1 something this man did over and over again. The other thing we
2 learned in this case, which the government seems to think we
3 made up out of whole cloth but which there was abundant
4 evidence for, is that Mr. Brooks felt he was owed money because
5 he didn't get these credits or overrides for GPO sales.

6 You may remember he had Texas. He was supposed to get
7 the commissions from these group organizations that do mass
8 purchasing. But MiMedx was going in there and selling
9 directly, and therefore, basically, he was not getting a
10 commission he felt he was entitled to.

11 Mr. Carlton admitted this. This was a question by the
12 Court: "Do you have personal knowledge of whether they, CPM,
13 had a complaint about the way MiMedx was interacting with the
14 GPOs in Texas?"

15 Mr. Carlton: "They complained about a lot of things, but that
16 was one of them, sure."

17 "Q. You were of the view, were you not -- this is Mr. Carlton
18 again -- that there was actually merit to CPM's position that
19 they were entitled to money that they weren't getting because
20 MiMedx was encroaching into this GPO space. Fair?

21 "A. I did advocate for that perspective, sure."

22 We didn't make this up. This is real. There was a
23 real issue that Mark Brooks felt he was entitled to money,
24 because MiMedx was selling product in the GPO space that he
25 felt he should be getting a commission or an override on.

KBD3PET1

Summation - Mr. Menchel

1 Their witness, Mr. Carlton, admitted that on cross-examination.

2 Now, what happens. This is the critical time period.
3 I am going to walk you through slowly and not just cherrypick
4 the documents the government did, but as many as I can in the
5 time we have.

6 In late June, this is just six days, June 24, 2015,
7 from the end of the quarter. This is important to stop and
8 think about for a moment. They are claiming that two days
9 later Mr. Petit bribed Mr. Brooks because he was so desperate,
10 so desperate to get this \$2 million order. Well, look what
11 happened? The exact opposite is true. This is an e-mail from
12 Mr. Taylor to Mr. Carlton. A couple of important things about
13 this e-mail, folks. First of all, you heard testimony in this
14 case that MiMedx would just load up whatever product they had
15 and give it to a distributor because all they wanted to do was
16 hit their number. That's not true.

17 Look at the e-mail. "David Nix gave me what we could
18 deliver off of CPM's proposed mix." David Nix, CPM. The next
19 paragraph. "David gave me a list of items they had ordered in
20 the past six months and we can do an alternate mix to get us to
21 just under 1.9 million post 5 percent discount."

22 They are not randomly picking whatever they have.
23 They're choosing a product mix based on prior historical usage
24 by CPM. Absolutely nothing wrong with that. Part of the
25 problem that you learned was, although Mr. Brooks was supposed

KBD3PET1

Summation - Mr. Menchel

1 to be buying this product, because he would wait until the last
2 minute, they didn't have the perfect inventory around, because
3 he would wait until the last minute.

4 But then here's the most important portion of this
5 e-mail from Mr. Taylor. Remember, they're claiming Mr. Taylor
6 was in a conspiracy with Mr. Petit to bribe Mr. Brooks because
7 they were desperate for the order. He says, "From my
8 perspective, I think we've given all we can. If that doesn't
9 work for them, then I guess he is choosing to discontinue doing
10 business with us and we will deal with it." We will deal with
11 it. Does that sound like someone the next day is going to do a
12 bribe. That makes no sense. That does not comport with
13 anyone's life experience. That's why you're here. Because
14 this shows you what happened in real time. Not some witnesses
15 who have come in years later where they have the thumb, the
16 government's thumb on them to say whatever they want, and I'm
17 going to show you they're worried about that. But what was
18 being said at the time. Next slide, please.

19 This is what he was talking about in terms of he felt
20 as far as we could go. This is from Mr. Taylor.
21 Mr. McLaughlin is, as you may recall, the CPM person. He's
22 right underneath Mr. Brooks. This discussion about the \$2
23 million order was still in play, right there in black and
24 white. What also is in black and white is something going
25 forward and this was something I respectfully submit

KBD3PET1

Summation - Mr. Menchel

1 Mr. Hartman confused yesterday, whether intentionally or not,
2 I'll leave to you. But if you look at number five, it says "In
3 Texas MiMedx will give CPM visibility to hospitals we are
4 working with to join GPO contracts and where possible allow CPM
5 to opt into the contracts."

6 I don't want you to get confused. I just showed you
7 testimony from Mr. Carlton who said Mr. Brooks felt he was
8 already owed money in the past for GPO overrides and
9 commissions he didn't get. This condition number five is going
10 forward. Going forward, MiMedx is saying we're going to give
11 you visibility into the hospitals and you can decide if you
12 want to join us. We haven't been doing that before; we're
13 going to do it now.

14 Two different things. Payment for the past for not
15 getting the overrides and commissions. Going forward you will
16 work with us if you want to and opt in on GPOs. Those are not
17 the same. Next, please.

18 Mr. Petit had enough. This is now the next day
19 because apparently they turned down that offer. This is the
20 man they say on June 26 committed a bribe. Here he is on
21 June 25 telling Mr. Brooks your consultancy relationship with
22 us is over. And you also heard testimony in this case I
23 believe from Mr. Carlton, that MiMedx was also in the process
24 of completely ending the relationship with CPM, not just this
25 consultancy, but the whole distributor relationship because

KBD3PET1

Summation - Mr. Menchel

1 they were fed up. Mr. Petit was fed up, everybody in the
2 company apparently was fed up. So what does he do. He gives
3 Mr. Brook notice that they're canceling it. Terminating the
4 agreement.

5 And then on the bottom, and this is extremely
6 important, it's been swept under the rug, it's been ignored by
7 the government. I want you to look at what happens here. He
8 says, and the restricted stock award scheduled to vest on
9 June 11, 2016, June 11, 2017, June 11, 2018, we're taking those
10 back. These haven't vested yet. These are 15,000 shares.

11 Let me stop for a moment about this. You heard from
12 Mr. Carlton MiMedx would use these consulting arrangements to
13 give distributors skin in the game, to make them feel they're
14 part of the company as a partner. Nobody ever said this was
15 wrong until this trial. This is a way of developing a
16 relationship. And they would provide market intelligence, but
17 the whole point was to develop a relationship and keep the
18 distributor happy. This is not a bribe. No one is saying it
19 is a bribe. Not even the government is suggesting this is a
20 bribe. Next slide, please.

21 And here's the biggest irony of this case. Who is it,
22 after Mr. Petit -- can we go back to the prior slide. The time
23 of this, if you can highlight it was 6:42 p.m. That night, he
24 cancels it on June 25. Next slide, please. At 11:18 p.m.,
25 7:18 Eastern, actually, just a short while after Mr. Petit has

KBD3PET1

Summation - Mr. Menchel

1 sent a termination letter, look what Jeff Schultz does. The
2 man, by the way, who claimed, you know, he was totally shocked
3 by all this. First he completely tries to pretend that he
4 didn't do what he did. Mr. Bruce asked him this question.

5 "Q. But isn't true, sir, you were willing to go to bat and be
6 an advocate for CPM within MiMedx; isn't that true?

7 "A. No, that's not true.

8 "Q. Sir, I am going to refer you, let me see if I can refresh
9 your memory. I show you Defense Exhibit 134A. Take a moment
10 to look that over, sir.

11 "A. Yes."

12 Let's look at the text message Mr. Schultz to
13 Mr. Brooks left an hour after Mr. Petit had ended the
14 relationship: Bro, if there is any chance at all that I can be
15 your advocate tomorrow to make this work, God knows I will do
16 everything or anything to assist.

17 I don't have time to put up all the testimony, ladies
18 and gentlemen. But when he was confronted with this text
19 message, he made a joke about pizza. Okay. And then tried to
20 pretend he didn't mean he was being an advocate. He used the
21 word "liaison." That's a classic example of a witness shading
22 because he thinks he has to help the government and hurt
23 Mr. Petit. That's all he cares about. The truth is he was an
24 advocate.

25 You know who else was? Mr. Carlton. Mr. Carlton also

KBD3PET1

Summation - Mr. Menchel

1 advocated that Mr. Brooks was entitled to be compensated for
2 GPO overrides.

3 "Q. We're going to talk about the longterm relationship but I
4 want to focus on June 25. Did you not advocate or attempt to
5 see if there was a way to resolve the disputes that CPM was
6 having with MiMedx?

7 "A. Again, I do remember advocating for the position on
8 overrides because the guys locally thought that there was
9 something Brooks, that was something Brooks deserved." He goes
10 on to say, "So as memory serves I thought the overrides made
11 sense."

12 So whether it is the GPO business or the GPO
13 commissions, that's not really important. The bottom line is
14 their witnesses were the ones that were actually advocating to
15 turn around and undo the termination that Mr. Petit canceled.
16 They're the ones, the government witnesses, wanted this
17 relationship reinstated. And they went to Mr. Petit, and they
18 told him, you know, Mr. Petit, it's true Brooks is a bad guy
19 and he has done a lot of bad things, but you don't have the
20 full story. We haven't been exactly squeaky clean either. We
21 have encroached on his space. The man has a point.

22 And that's when Mr. Carlton remembers, after he spoke
23 to Mr. Petit: "Do you recall Mr. Petit telling you at a
24 minimum we owe the man an apology?

25 "A. He did say that. "

KBD3PET1

Summation - Mr. Menchel

1 This is an honorable man, despite what has been
2 portrayed in this courtroom. Pete Petit is an honorable man.
3 We'll talk about his character a little more. When he was told
4 that he did not have the full story, he said, "At a minimum, we
5 owe the man an apology."

6 And then the next day, in the morning, after having
7 been informed by Mr. Schultz and Mr. Carlton, he reversed
8 course, not because he was trying to bribe somebody. But
9 because Schultz and Carlton had advocated on Mr. Brooks' behalf
10 that he was properly owed something that he wasn't getting.

11 Again, folks, just use your common sense. Do you
12 decide you are going to terminate a relationship the day before
13 only to bribe a man the next day because you're so desperate
14 for business? That literally makes no sense.

15 Here's what he writes to Mr. Brooks, cc'ing Lexi Haden
16 and Mr. Carlton. "Mark, I believe I am now fully informed as
17 to the circumstances that have developed around our mutual
18 business activities. What I was told yesterday was not
19 factual. Therefore, the decision I made to cancel our
20 consulting agreement was based on misinformation. With this
21 e-mail I am rescinding the cancellation of your consulting
22 agreement."

23 This is important. Because what was it that Mr. Brook
24 was going to lose? He was going to lose 15,000 shares of
25 MiMedx stock. Still hadn't vested yet those three buckets of

KBD3PET1

Summation - Mr. Menchel

1 5,000, 5,000, 5,000 that I showed you, and Mr. Petit was saying
2 I was wrong, I didn't have all the facts, I'm reinstating that.

3 He goes on. "This is not the way I wish to conduct
4 business. I certainly apologize and I would like to schedule a
5 brief call with you. Thanks for your patience."

6 That sounds like a man who is so desperate for the
7 business that's he will do anything? He's righting a wrong.
8 That's all he's doing here. Next slide, please.

9 There was some confusion about this. You may recall
10 there was testimony in this case from Mr. Carlton -- I think I
11 am going to get to it later if it's not in the deck, that
12 Mr. Brooks didn't want the \$15,000 shares back. He didn't want
13 the \$15,000 -- 15,000 shares back, excuse me. You know why?
14 Because Mr. Petit had just pulled it from him and he didn't
15 want to be in that position again. That makes perfect sense.
16 Okay. The man has restricted stock agreements taken away from
17 him the day before, and he didn't want to be in that situation
18 again. So he wanted instead money in exchange for those 15,000
19 shares. That's not a bribe. He's saying I don't want the
20 15,000 right now because you and I are not in a good place.
21 Just pay me the cash. It says it in black and white. This was
22 this term sheet I told you about, similar to what we looked at,
23 except it changed now the next day. Again, the order is still
24 there at 2 million. And then it says "In replacement of the
25 June 2015 RSAs, the 15,000 shares, MiMedx will convert it to a

KBD3PET1

Summation - Mr. Menchel

1 \$2,000 consulting fee." He already had the stock as part of
2 his consulting arrangement, and now he was getting the cash
3 instead.

4 You got to walk through these document a little bit
5 more slowly than the government did to really see the truth of
6 what's going on here in this case. And when you do, it's clear
7 as day.

8 And then this is the cover page to this document. Oh
9 by the way, again, number five remains the same, in Texas
10 MiMedx will give CPM visibility into the hospitals we are
11 working with. That's going forward. That's going forward.

12 Now, Mr. Petit e-mails this term sheet to Mr. Brooks.
13 He says, "Mark, please review the attached and give me or Mike
14 Carlton a call. Thank you for your patience."

15 Do you remember what Mr. Carlton's testimony was about
16 this \$200,000 that's in black and white in an e-mail where
17 Mr. Petit is saying if you have any questions you can call me
18 or Mr. Carlton. I didn't know anything about this \$200,000
19 until I heard it about it from Schultz and I was shocked. I
20 don't know how else to say this politely. That is a lie. That
21 is a bold faced lie. There is no way that Mr. Petit would have
22 told Mr. Carlton -- I'm sorry, would have told Mr. Brooks,
23 please review the attached this term sheet, and give me or Mike
24 Carlton a call, if Mr. Carlton had no idea what was in that
25 term sheet. This is another example of what I'm talking about

KBD3PET1

Summation - Mr. Menchel

1 why you folks are here. Use your common sense.

1 MR. MENCHEL: (Continued) Mr. Petit would not have
2 invited Mr. Brooks to call either himself - Mr. Petit - or
3 Mr. Carlton, unless Mr. Carlton was fully in the loop as to
4 what these terms were. That doesn't fit with the government's
5 narrative. There has to be shock and concern over this
6 \$200,000. So they ignore this. It's right here at the time,
7 June 26, 2015. Not five years later. Then.

8 And by the way, is this some cover story that's
9 elaborately being created because people thought, you know,
10 five years later we might be in a courtroom charged with
11 crimes, we've got to cover ourselves? That's nonsense. These
12 are contemporaneous documents being generated in realtime about
13 a business negotiation that is evolving.

14 And that's another important point I want to make.
15 This relationship is a negotiation. Anybody who knows anything
16 about negotiation is they know this: It goes back and forth.
17 This for that. I'll take this instead of that. And that's
18 what's happening here. You know, Mr. Hartman man said there's
19 been so many reasons for why the \$200,000 was given. Yeah.
20 Because it he evolved during the course of this negotiation.
21 I'm going to show you that.

22 Next slide, please.

23 By the way, I said he wanted the \$200,000 in lieu of
24 the 15,000 shares. I asked Mr. Carlton "Fair to say these
25 15,000 shares are worth hundreds of thousands of dollars?

KBDQpet2

Summation - Mr. Menchel

1 "A. Presumably. It was a pretty significant amount, yes. I
2 don't know how much."

3 That completely jives with the \$200,000 because those
4 stock options were extremely valuable and Brooks wanted the
5 cash because they had a tumultuous relationship, and he didn't
6 want to be at the whim and caprice of Mr. Petit in the future
7 who could cancel them again. makes total sense.

8 Then it changes again. Then the decision is -- well,
9 we'll give you the \$200,000 and the stock to resolve the GPO
10 issue, the money he felt he was owed in the overrides. This
11 was a document that I showed Mr. Carlton.

12 "Q. Can we agree that she" - that's Lexi Haden - "is
13 apologizing to you for not realizing that an additional term of
14 the stock grant had to be added in?"

15 So now, what's happening? You had the cash in lieu of
16 the stock and now Mr. Carlton is adding back in the stock in
17 addition to the cash.

18 "A. She is. There was a moment I remember in time where there
19 was a discussion about whether it was going to be cash or stock
20 or both, and I believe it was going to be both, and I think
21 that's what this is referring to. Brooks got both stock and
22 cash, from my memory."

23 And you know who was advocating for that?
24 Mr. Carlton.

25 "A. I was advocating for him to keep the stock and the cash

KBDQpet2

Summation - Mr. Menchel

1 which is what Brooks expected."

2 I want you to look at that statement and think about
3 it for a moment. Remember what Mr. Carlton said? He didn't
4 ever speak to Brooks. Only thing he knows about \$200,000 was
5 from Jeff Schultz. I don't know how to put this politely.
6 That is a lie. And it's proven right here. This was
7 cross-examination. This is the unscripted part. This is the
8 part where me and Mr. Burck were asking questions that he
9 wasn't prepared for.

10 You know, I think it was Elvis Presley who said:
11 Truth is like sunshine. You can shut it out for awhile, but
12 eventually it comes back in. And I would submit to you that
13 that's what happened in the unscripted portion of Mr. Carlton's
14 testimony. He knowingly gave away the truth. He was aware of
15 both the stock and the \$200,000, and not only was he aware of
16 it, he was aware Brooks wanted both, and he was the one
17 advocating for it. That is completely at odds with what the
18 government told you yesterday and with what Mr. Carlton said in
19 his own direct examination. 180 degrees different.

20 Next slide, please.

21 This is the email that Mr. Hartman said is a coverup.
22 A coverup. Remember the government's theory. The government's
23 theory is that Mr. Taylor and Mr. Petit are in a conspiracy to
24 bribe Mr. Brooks. It couldn't be further from the truth. This
25 is not a cover your CYA email. This is something happening on

KBDQpet2

Summation - Mr. Menchel

1 the same day. You saw the agreement. It originally was cash
2 in lieu of the stock. Then somebody halted and advocated on
3 behalf of Mr. Brooks, that he should get both: To not only
4 give him back his stock, which he was already entitled to. The
5 stock he just gave him he was already entitled to under the
6 consulting agreement, but now we're going to give him the cash
7 to make up for the GPO override.

8 I think this slide is actually upside down in terms of
9 the order, but it begins with Mr. Taylor at 3:18 on the top
10 saying, "I thought we needed him to forego the stock from
11 June 11 of this year for 200K." Exactly what you saw in
12 writing.

13 And Mr. Carlton responds -- and it's sort of upside
14 down -- but Mr. Carlton responds at 3:24, just a few minutes
15 later, "Agree to let him keep it based on lost business."

16 I don't know how much clearer it can be. This is the
17 man that they want you to believe is telling the truth. This
18 is what he said at the time. We're going to let him keep both.
19 He already was entitled to get his stock back now we're going
20 to give him cash on top of it. He's going to take both. The
21 man who is telling Mr. Taylor that is Mr. Carlton, the man who
22 says he didn't know anything about this except when Jeff
23 Schultz told him, and he was shocked because it smelled like a
24 bribe. This is just a business discussion.

25 Go back one second, please.

KBDQpet2

Summation - Mr. Menchel

1 There is no evidence in this case that Bill Taylor
2 wrote this to cover himself because he thought five years later
3 he may be sitting in federal court. That's absurd. This is a
4 realtime negotiation that is evolving, evolving.

5 Next, please.

6 Mr. Petit weighs in later that evening and answers the
7 exact same question. Tells Mr. Taylor we're giving him both,
8 "Both given to avoid going through all hospital contracts in
9 detail and giving a rebate or override." We're giving him
10 both. He had the 15,000 shares, he wanted it instead \$200,000,
11 but he also was complaining he's owed money for the GPOs, so
12 you know what we're going to do? We're going to give him the
13 \$200,000 and we're going to let him keep the stock, the stock
14 he was already entitled to. It was already in this agreement.
15 Now we're going to give him the \$200,000 to make him happy for
16 the GPOs.

17 Folks, that is not a bribe. it may be hard-line
18 tactics by Mr. Brooks. Mr. Petit as the head of the company
19 has every right to decide if he wants to do this. You know,
20 all you heard about this was Mr. Schultz saying, he got off the
21 phone, Mr. Brooks did, and said, "I got everything I wanted."
22 That's what he testified to. So what? They want you to
23 convict this man because Mr. Schultz said that after Mr. Brooks
24 had a one-on-one conversation with Mr. Petit, he got off the
25 phone and said, "I got everything I wanted." It's memorialized

KBDQpet2

Summation - Mr. Menchel

1 right here he got everything he wanted. Nobody was hiding it.
2 Nobody was expressing shock. Mr. Carlton certainly wasn't
3 expressing shock. He was educating Mr. Taylor, as was
4 Mr. Petit. This is the type of evidence -- this actually
5 flatly refutes that this was a bribe. This was a business
6 negotiation, pure and simple.

7 I asked Mr. Carlton about that email I just showed
8 you. Mr. Petit responded to this email as well that you were
9 on and he said both, "You would agree with me, meaning both
10 given is the stock and cash, correct?

11 "A. Correct.

12 "Q. To avoid going through all hospital contracts in detail
13 and giving a rebate or override. Do you see that?

14 "A. I see that, yes.

15 "Q. Do you understand that to mean this GPO discussion you
16 were advocating on behalf of CPM?

17 "A. I see that, yes."

18 This was cross-examination, and this is what I mean
19 how if you were in this trial, this might have gone over you
20 like nothing, and that's not an insult to any of you at all.
21 You have to really be deep into these documents and look at
22 them chronologically, which they didn't come into evidence like
23 that -- it's not the nature of trials -- to understand what's
24 really going on here. Flat out he's telling you, Mr. Carlton,
25 the man who said this was a bribe. "No, I'm the one that told

KBDQpet2

Summation - Mr. Menchel

1 Mr. Petit he should get both because I was advocating on behalf
2 of CPM, they were owed money for this GPO dispute, for the
3 money they hadn't gotten paid in the past."

4 Next slide, please.

5 Mr. Schultz, who, by the way, is a heck of a salesman.
6 We're going to talk more about him. Remember he told you he
7 was concerned and shocked the deal closed this day. Brooks
8 accepted. Yes, he got everything he wanted. There's not a
9 single text message in this case between Brooks -- I'm sorry --
10 between Schultz and Carlton or an email between Carlton and
11 Schultz or anybody else expressing shock and concern about the
12 \$200,000 and the return of the stock. Nobody. There's not a
13 single real document in this case that was generated at the
14 time that shows that's true.

15 Look at what Schultz wrote at the time. This is right
16 after the deal wrapped up.

17 "Pete, I'm still in Dallas tonight and I just wanted
18 to say thank you very much for stepping in and assisting on
19 getting the CPM deal closed today. Mark is an extremely
20 different person with a unique style, but he has an incredible
21 amount of respect for you, like we all have, and he admires all
22 your successes over the years, and this truly made the
23 difference in coming to a solution."

24 Does that sound like a guy who was shocked and
25 couldn't believe and had never heard in his life of such a

KBDQpet2

Summation - Mr. Menchel

1 thing? Either the man is the greatest pathological liar or one
2 of those two things. And they can't both be true, right?
3 Either at the time he's writing stuff he doesn't even remotely
4 believe is true or what he said on the stand before you is not
5 the truth, and I submit it's the latter because this is what he
6 wrote at the time. No expression of shock or concern. A thank
7 you to Pete Petit for getting the deal done that he,
8 Mr. Schultz and Mr. Carlton wanted. And so it is.

9 It's in black and white, ladies and gentlemen. It's
10 not in a paper bag. It's not in some illicit agreement. It's
11 not in some other company's name. It's right here in the
12 consulting arrangement as it was amended on June 26 and signed
13 by Mr. Brooks and Mr. Petit drafted by the company's lawyer,
14 Lexi Haden. It says both, "In consideration of duties and
15 services provided by the consultant set forth herein, company
16 shall pay to consultant a one-time consulting fee in the amount
17 of \$200,000 to be paid to consultant on or before June 30,
18 2015," and reinstates the 15,000 shares of restricted stock
19 that Mr. Petit had pulled away. This makes sense. He merely
20 gave him back the shares he was already entitled to and to make
21 up for the GPOs, he put that in this consulting arrangement as
22 well.

23 Next, please.

24 What happens? This is the thing, by the way, that
25 Schultz said, "We could never let the auditors see this. We

KBDQpet2

Summation - Mr. Menchel

1 could never let the auditors see this." He could never have
2 said it more emphatically and more persuasively to you on the
3 stand. Lexi Haden, the company's general counsel, head lawyer,
4 emails Bill Taylor, John Cranston and Michael Senken, the head
5 accountant, the chief financial officer, the one who is going
6 to be dealing with the auditors when there's an audit about
7 this agreement containing the \$200,000 and the 15,000 shares of
8 restricted stock.

9 "Lexi, Hi. We need to pay Mark Brooks the \$200,000
10 consulting fee for the attached final agreement. Whoever is
11 authorized to approve this request, will you please let
12 accounting know so they can process."

13 I'm sorry, what happened to the brown paper bag? What
14 happened to some fake shell company? What's happened in this
15 trial, I submit to you, has been an outrage. And I don't say
16 that lightly. This is the truth. The company knew full well
17 about this thing. It was not some scam cooked up. It's right
18 here in black and white. Just a couple of days later it's
19 forwarded on to the head accountant for payment.

20 Next slide, please.

21 This is what I was talking about yesterday how
22 Mr. Hartman kind of tried to twist this around a little bit.
23 He says, "For starters, it's totally inconsistent with
24 Mr. Petit's testimony to the SEC and his statement to investors
25 that the money was for consulting work. And, more importantly,

KBDQpet2

Summation - Mr. Menchel

1 you know from the documents that the defendants themselves
2 introduced at this trial the GPO issues with Brooks continued
3 after June 26 when the defendants agreed to pay him that
4 \$200,000."

5 Let's stop right there. This is exactly what I was
6 telling you about. The \$200,000 was for the money he felt he
7 was owed from past overrides or commissions he was not given,
8 and then they showed you condition 5 "In the future we're going
9 to show you our contracts, and you can decide if you want to
10 opt in." They're two different things: One was a payment for
11 the money he was owed, and the other is going forward now,
12 we're going to be inclusive with you. Mixed them. Two
13 different things, and he put them together. They're not the
14 same.

15 Take a look at Defense Exhibit 186. In this document
16 Mr. Schultz talks about showing CPM the entire hospital list of
17 who are contracted with the GPOs and the IDNs in Texas.
18 They're literally going through all the hospital contracts in
19 detail and deciding about overrides. This is going forward
20 folks. This is allowing them to decide do you now want to be
21 in this contract going forwards.

22 "That's exactly what Pete Petit told Lexi Haden,
23 MiMedx's general counsel, that payment was designed to avoid.
24 That is false. The \$200,000 was to not go back and look at the
25 old contracts to see how much money do we actually owe this guy

KBDQpet2

Summation - Mr. Menchel

1 for all this work we did that should have been his work; that
2 he learned about from Brooks -- I'm sorry -- that he learned
3 about from Carlton and Schultz. And it says it right here.
4 This is the document that Mr. Hartman was referring to. This
5 is August 5.

6 By the way, before we get to this email -- just take
7 it down for one second?

8 You might remember that there was testimony from both
9 Mr. Carlton and Mr. Schultz, the relationship was over. Right?
10 The relationship was over. After this deal, it was over.
11 That's not true. That's not true. But the reason why Schultz
12 and Carlton wanted you to believe it was over is because it
13 supports the theory that this \$200,000 was just a bribe. See,
14 we just paid him that money, and then we're going to get out of
15 the relationship with him. That's not what happened.

16 Jeff Schultz, August 5. So this is about six weeks
17 later.

18 "Mike and Nick" -- Pete Petit is cc'd on this -- "I
19 just wanted to update you on the very positive meeting Joe
20 Longo and I had with CPM Monday night in Dallas. We met for
21 three and a half hours, and they were very appreciative of us
22 giving them their override 5 percent for the urology." That's
23 a separate issue, by the way. "And they appreciated us showing
24 the entire hospital list of who are contracted with MiMedx in
25 the GPOs and IDNs."

KBDQpet2

Summation - Mr. Menchel

1 And this is the going-forward piece. "Overall,
2 they're going to tell us -- they are telling us they are going
3 to participate in them (still vetting through them all) of our
4 GPO/IDN contracts in Texas, and we will have them sign a legal
5 agreement once they commit."

6 This is the going-forward piece. This is condition
7 number five in the agreement. We're going to show you what we
8 have. If you want to join us going forward, we'll do that for
9 you.

10 Next slide, please.

11 Another example about everything that is just called
12 fake or phony. Even as CPM is being terminated -- this is now
13 in September the relationship does go south again but not as
14 quickly as neither Carlton nor Schultz said it did. In fact,
15 that email showed they thought it was going to pick up and it
16 was going to be great, but it doesn't happen.

17 Even as they're being terminated, OK, they only sought
18 to exchange \$392,000 of the so-called \$2.1 million fake order.
19 You know why? Because I showed you a document earlier where
20 the mix was based on historical patterns they had done in the
21 past. This wasn't just stuffing the channel with product.
22 MiMedx looked at what it is that CPM normally buys, and that
23 was the inventory they gave them.

24 This is the reference to that return in September.
25 "Good afternoon, Jeff."

KBDQpet2

Summation - Mr. Menchel

1 This is from Sherron Burrow who you heard about who
2 works for CPM to Jeff Schultz.

3 "I hope all is going well with you. We need to get an
4 RMA number."

5 That's a return authorization number. If any of you
6 have ever been in business, if you want to send product back,
7 you want to return something, you need something called an RMA.

8 "I need to get an RMA for the product we need to
9 exchange from the last quarter purchase. Would you be able to
10 help me or direct me to the correct person? Here's the list of
11 the product that needs to be exchanged."

12 Is it \$2.1 million? Is it a totally fake order just
13 to make the revenue and then go on? It's a fraction of that.
14 It's \$392,000.

15 Next slide, please.

16 I want to talk to you a little bit more about Carlton
17 and Schultz, Mr. Carlton and Mr. Schultz, because that's really
18 the only evidence they've submitted that there was a bribe, and
19 the documents I just walked you through slowly and carefully
20 show anything but. So let's talk about who these guys are and
21 why they were here.

22 First, his Honor is going to instruct you on how you
23 assess a witness's credibility. This is a piece of it. His
24 Honor has a longer instruction. I don't want to mislead you,
25 but I want to focus on the portions that are relevant to my

KBDQpet2

Summation - Mr. Menchel

1 discussion.

2 This is what your Honor is going to instruct you on, I
3 believe on Monday, if all goes according to plan.

4 Your decision to believe or not believe a witness may
5 depend how that witness impressed you. How did the witness
6 appear? Was the witness candid frank and forthright? Or did
7 the witness appear to be evasive or suspect in some way? How
8 did the witness testify on direct examination compared with how
9 the witness testified on cross-examination?

10 Let me stop this right there. How many times on
11 direct examination did Mr. Schultz and Mr. Carlton or even
12 Mr. Martin ever say in response to a government's question, "I
13 don't remember. I don't know." I think the answer is never.
14 How many times when we asked questions on cross-examination
15 when we confronted them with things that didn't fit the
16 government's narrative did we hear: "I don't know. I don't
17 remember. I don't know. I don't remember." This is exactly
18 what this instruction is supposed to tell you to focus on.
19 Consider that. Consider how different they were on direct and
20 cross. Scripted versus unscripted.

21 Did the witness -- was the witness consistent or
22 contradictory? I just showed you - and I'm going to do a
23 little bit more - how Mr. Carlton swore up and down that he
24 learned about this \$200,000 only from Schultz when in reality
25 he was all over this thing working with Mr. Petit.

KBDQpet2

Summation - Mr. Menchel

1 Did the witness appear to know what he or she was
2 talking about? Did the witness strike you as someone who was
3 trying to report his or her knowledge accurately?

4 Next slide, please.

5 How much you choose to believe a witness may also be
6 influenced by the witness's bias. Does the witness have a
7 relationship with the government or a defendant that may affect
8 how he or she testified? Does the witness have some incentive,
9 loyalty or motive that might cause him or her to shade the
10 truth?

11 I want you to consider all of these things as we walk
12 through. There was something else I want you to think about --
13 the number of meetings in this case that the government had
14 with these witnesses was extraordinary. It was extraordinary.
15 His Honor repeatedly instructed you and he's, of course, right,
16 as he always is, that the fact that the government meets with
17 its witnesses is perfectly proper. People prepare their
18 witnesses. I have no quarrel with that. But you should ask
19 yourself, why does it take 10, 15, 20 meetings, full days? You
20 know the truth doesn't require that much. If it's the truth,
21 it's just true, and it doesn't change. You don't need 10, 12,
22 15 meetings if someone is telling you the truth the whole way
23 through. That's an enormous waste of time and energy. If you
24 want to shape somebody, if you want to get them on to your
25 team, that's a process. That takes time.

KBDQpet2

Summation - Mr. Menchel

1 And his Honor did say during one of these instructions
2 "The jury once again needs to understand there is nothing
3 improper about a party that is calling a witness to meet with
4 that witness in advance." Absolutely true. That doesn't mean,
5 of course, that you can't evaluate that as part of the mix in
6 assessing credibility, but per se it is not improper in any
7 respect. I'm asking you to consider it. Because it's not
8 normal to meet with somebody 20 times to testify for half a
9 day.

10 Next question -- next thing.

11 Let's talk about Schultz. This man had met with the
12 prosecutors so often, that he calls them inadvertently, I
13 think, by their first names during this trial.

14 "Q. Do you recall which agents were in the first proffer with
15 you?

16 "A. Yeah. It was Ed, Scott for sure. Don't know for sure if
17 Daniel was there."

18 This is a man that they can prosecute at any moment,
19 right? They can prosecute him. The immunity agreement doesn't
20 prevent them from deciding to bring charges. They just can't
21 use his statements in court against him. He's calling them by
22 their first names. That's what happens when you meet with
23 somebody 10, 15, 20 times, you get to know them pretty well.

24 By the way, before we get there, I want to talk to you
25 a little bit more about Mr. Schultz. What does Mr. Schultz and

KBDQpet2

Summation - Mr. Menchel

1 Mr. Carlton, what do they do? They're salesmen. They're good
2 at selling. If they weren't, they wouldn't be doing that job.
3 I don't know if any of you picked up on this, but when
4 Mr. Bruce or Mr. Packard was asking Mr. Schultz questions --
5 they never met him before, total strangers -- he would say,
6 "That's not correct, Mr. Bruce. That's not correct,
7 Mr. Packard." That's good sales technique, right? You refer
8 to somebody by their name, it makes it more emphatic. it Makes
9 it more persuasive. He's a trained salesman. He knows what
10 he's doing. He knows how to speak well.

11 What I'm about to show you, I submit to you, is the
12 single, most revealing moment that happened in this courtroom,
13 and I'm willing to bet because it came and went so quickly,
14 most of you probably didn't understand the significance.
15 That's why I want to focus on it. And again, that's no insult
16 to you. This is something that came and went in a matter of
17 probably 30 seconds, but it's the reveal. It gives you the
18 peek behind the curtain about what is really going on in this
19 case.

20 Now, let me set this up for you. The Court, his
21 Honor, is asking whether Mr. Hartman wants to do something
22 called a voir dire. That means do you want to ask the witness
23 questions about a document that Mr. Bruce was trying to get in.
24 The document is not important for these purposes. In fact, I
25 don't think it came in. It's not important for these purposes.

KBDQpet2

Summation - Mr. Menchel

1 I want to show you what happened when Mr. Schultz was off
2 script with Mr. Hartman because this was not expected. This
3 happened during Mr. Bruce's examination. Mr. Hartman asks if
4 he can voir dire the witness. The judge says he can.

5 And I want you to pay very careful attention to what
6 happens in this exchange:

7 "Q. Mr. Schultz, the attachment to this memo is a proposed
8 contract; is that right?

9 "A. Yes.

10 "Q. And was this particular act of drafting this contract
11 something that was done regularly or was this a specific
12 instance of -- "

13 And before he can even finish asking the question,
14 Schultz is primed to say what he wants him to say.

15 "A. This was a specific instance for CPM."

16 It's a little reveal, right? He's already answering
17 the question because he knows where Mr. Hartman wants to go.

18 It gets worse. Next page.

19 This the next question:

20 "Q. And the data that was in here, are these data that are
21 drawn from -- or at least in the contract itself, are these
22 drawn from MiMedx's records--" now here's the thing he does.
23 He says, "Is it this or is it that? Is it this or is it that?"
24 Telegraphing what the right answer is.

25 "And the data that was in here are these data that are

KBDQpet2

Summation - Mr. Menchel

1 drawn from -- or at least in the contract itself, are these
2 drawn from MiMedx's records or are these terms that MiMedx is
3 seeking to have Mr. Brooks adhere to?

4 "A. These are the terms that Mr. Brooks is -- we're looking
5 for him to accede to."

6 He knows exactly what he's supposed to be saying.

7 "Q. And was making records like this a regular practice,
8 contracts like this?

9 "A. No.

10 And here's where everything goes south, folks. Here
11 is where the reveal occurs in this courtroom that lets you know
12 that these witnesses have been pressured to say whatever those
13 folks at that table want them to say. Mr. Hartman makes a
14 mistake. He uses a fancy word that most of us don't use. He
15 uses the word bespoke. It's not -- you could be forgiven for
16 not knowing the word. Apparently Mr. Schultz didn't know the
17 word. I'm sure a lot of people in this courtroom don't know
18 the word. Bespoke means custom made, and so he asks
19 Mr. Schultz:

20 "Q. Was this something that was generated through a
21 quasi-automated process or was in something that was done in a
22 bespoke way?"

23 Schultz does not know what that word is, but he knows
24 what he's supposed to say because the second "or was it in a
25 bespoke way?" And what does he say?

KBDQpet2

Summation - Mr. Menchel

1 "A. It was done in a spoke way."

2 This man will literally say anything that these
3 prosecutors put into his mouth, except he screwed up because he
4 didn't know what the word bespoke was. He just knew he was
5 supposed to say whatever it was Mr. Hartman wanted him to say
6 in the second half of the "or." Mr. Hartman respectfully has a
7 problem because he used the word "bespoke," and the witness
8 said "a spoke" and that makes no sense.

9 So Mr. Hartman doubles back and says, "Well, I mean,
10 you understand what I mean by that?"

11 And I don't know if you caught it, Schultz put is head
12 down because he realized he had just made a big boo-boo and
13 said:

14 "A. No, please rephrase this."

15 If there's any question in your mind that these are
16 just shills for the government who will say whatever these
17 prosecutors want them to say, this moment revealed it. There's
18 so much talk about Mr. Petit in a five-minute back yard
19 conference. They had dozens of meetings with these guys to
20 prime them to say whatever they wanted them to say, and this is
21 the proof. An honest witness, fair to both sides, just here to
22 tell the truth, how many times did we hear that? Straight down
23 the middle would have said in response to that question, "I'm
24 sorry I don't know what a spoke or bespoke, I don't know what
25 you're talking about." Schultz doesn't do that because he just

KBDQpet2

Summation - Mr. Menchel

1 has to go wherever the government wants him to go. So he
2 thinks. Why? Because, as he testified, they could put him in
3 Mr. Petit's chair anytime they want. That's tremendous power,
4 folks. That's tremendous power. Don't underestimate that
5 power. Whether you did something wrong or not, sitting in that
6 chair is the worst place you ever want to be. And Mr. Schultz
7 knew that. And that's why he was going to say whatever they
8 wanted him to say, whether it was the truth or not.

9 More perfect examples of this. Mr. Schultz, this is
10 on direct examination:

11 "Q. Mr. Schultz, did you reference at all the \$200,000 payment
12 in this email? Is it anywhere in the email?

13 "A. No, I didn't because I knew we couldn't put it in that.
14 It was a side deal and a bribe. So I couldn't mention that in
15 there because I knew it -- it wouldn't be on the books to our
16 audit committee."

17 This is the document I just showed you where the
18 \$200,000 is being sent to the chief financial officer of the
19 company for payment.

20 Next slide.

21 So when Schultz is confronted about this, he realizes
22 he has to admit the truth. He barely did it, but he did it
23 here.

24 "Mr. Schultz, do you recall your testimony from Monday
25 during the conversation you had with Mr. Cochrane about paying

KBDQpet2

Summation - Mr. Menchel

1 the \$200,000 through his corporate entity and keeping it away
2 from the audit committee and off the books?

3 "A. Yes, I do."

4 Q. Mr. Bruce asks a question, "A \$200,000 payment that's in a
5 signed contract between CPM and MiMedx is not something that
6 would be hidden from the audit committee, correct?"

7 He can't help it, he starts to advocate for the
8 government.

9 "\$200,000 is pretty outrageous for a consultant."

10 That's not even responsive to the question.

11 "I've never seen that before, but no, if it was in the
12 contract, it wouldn't be hidden from the audit."

13 That's what it takes to get the truth in this matter.
14 And even then he's trying to help the government with his
15 answer.

16 Next, please.

17 Here's another theme that goes on throughout this
18 entire trial, and if I had plenty of time, I would put up every
19 piece of this. There is actually no evidence of what people
20 said in this case, just what witnesses understood them to say.
21 There's a huge difference.

22 "Mr. Schultz, you can answer. What was your
23 understanding of why Mr. Brooks was demanding the \$200,000?"

24 Notice the way it's framed. "what was your
25 understanding?" Did he actually say, "Mr. Schultz --

KBDQpet2

Summation - Mr. Menchel

1 Mr. Brooks said, 'I want \$200,000 in cash or I'm not going to
2 place the order?'" No. He asking, what was your
3 understanding?

4 "He wanted the \$200,000 in cash because then he would
5 place the order. To place the order, that's why he wanted the
6 money because he knew we needed that quarterly number."

7 The whole government's theory baked into one answer.
8 It's nonsense.

9 Similarly, again.

10 "Q. Based on what you heard during the conversation, what was
11 your understanding about that?

12 "A. There was no way he was placing the order unless he got
13 200,000, not a chance."

14 Didn't actually get any details of this conversation.

15 We can move on.

16 I want to go back to this. This happened repeatedly.
17 When Mr. Schultz was confronted with the fact that only 392,000
18 of this "fake order" had been returned, this is what he said
19 because he's here to advocate for the government and not just
20 play it straight.

21 "A. As I said before, I don't know what other returns were
22 swapped back. Could have been more returns they sent back."

23 He said it one, two, three, four, five, six times: We
24 don't know; there could have been others.

25 Folks, this is a real business. MiMedx is a real

KBDQpet2

Summation - Mr. Menchel

1 business. CPM is a real business. Millions of dollars don't
2 just magically get returned without paperwork. We talked about
3 this. You need a return authorization. If there was a return
4 authorization for any -- for a penny more than the 392,000 that
5 was already returned, you can guess that these very competent
6 prosecutors, very competent prosecutors would have put those
7 returns in front of you. They don't exist because it didn't
8 happen. But Schultz doesn't want to admit that because he's
9 not here to just play it straight.

10 Next, please.

11 This is what I'm talking about. There is a return
12 authorization. There's an invoice, a purchase order that has
13 to be backed out. You don't just return product with no
14 paperwork. If it existed, Schultz would have been shown it.

15 Next, please.

16 So, quickly about Mr. Carlton, I have to move forward.

17 This was interesting. Mr. Carlton wasn't sure if he
18 committed a crime.

19 Next slide.

20 But he was sure he could be prosecuted. And that's
21 what matters.

22 "Do you have an agreement with the government?

23 "I do not.

24 "Q. Has the government agreed or promised you would not be
25 prosecuted?

KBDQpet2

Summation - Mr. Menchel

1 "A. I have not been promised that."

2 You should consider the fact that these men are under
3 the thumb of the U. S. government in giving their testimony.
4 It's important. It matters.

5 Next, please.

6 Another man was basically trained to just say after
7 multiple meetings the buzz words the government wanted to hear.
8 How many times did we hear "hit number, hit number, hit the
9 number, hit a number, hit number?" Normal conversation doesn't
10 happen that way. Scripted, rehearsed conversation happens that
11 way.

12 Next slide, please.

13 And When he goes off script, he realizes it, and he
14 corrects. This was a question by Mr. Burck:

15 "Q. Do you recall -- well, let me ask you this: You testified
16 that the numbers, the revenue numbers, the guidance numbers you
17 felt were too high and unrealistic, right?

18 "A. No, I felt they were aggressive. I won't say unrealistic
19 but very aggressive.

20 "Q. So sitting here today, looking back on that period of
21 2015, you would say your testimony is -- let me make sure I get
22 this straight; that it was aggressive but not realistic?

23 Realizing he is off script, he self-corrects.

24 "A. There were some quarters that seemed unrealistic."

25 He literally changed his testimony in about three

KBDQpet2

Summation - Mr. Menchel

1 seconds because it had been pointed out to him that what he
2 said was true, and he needed to reverse because it doesn't fit
3 the narrative the government wants you to think is going on
4 here. These numbers were aggressive, yes, but they were not so
5 unrealistically high that people needed to commit fraud to hit
6 them.

7 Next, please.

8 We've already discussed this. I've shown you now a
9 million documents -- not a million, that's an exaggeration --
10 but plenty of documents that Carlton is directly involved but
11 he stuck to his story that the only way he knew about the
12 \$200,000 was through Schultz. That's how I heard about it.
13 That was the source.

14 And I asked him. I wanted to make sure I was a
15 hundred percent clear on this.

16 "I want to make sure I understand your testimony. Is
17 your testimony now that you learned about \$200,000 independent
18 of Mr. Schultz or only from Mr. Schultz?

19 "A. From Mr. Schultz."

20 He just testified he was advocating for the \$200,000
21 to Mr. Petit. But he told you "I only heard about this and I
22 was shocked from Mr. Schultz walking out of this meeting."

23 Next, please.

24 We've already shown you how he was involved. I'll
25 just move forward here.

KBDQpet2

Summation - Mr. Menchel

1 Let's talk about the back yard meeting, the fence
2 meeting. Another example -- one second -- another example of
3 cherry-picking and only putting in the pieces that you like
4 that fit your narrative.

5 On direct examination, this is what Mr. Carlton said
6 -- I'm sorry. Before I get there, it's important to understand
7 and put this fence meeting into context about who that man is,
8 Mr. Petit, the man, frankly, I am honored to represent in this
9 case.

10 These are the things that were said about him from the
11 witnesses who actually came here to testify against him.
12 Mr. Andersen: Charismatic, family-like environment, fair,
13 hard-charging, treated employees fairly, more involved than
14 other CEOs, always wanted to move forward and make progress.

15 Those are wonderful attributes. That's what you want
16 in a CEO.

17 Mr. Carlton: He was a workaholic, all in,
18 hard-working gentlemen, held firm to his views, was open for
19 feedback, he was good listener, he was accessible but he had
20 strong convictions.

21 These are the men that were called in here to try to
22 bury him, and even they had to admit the truth about his
23 character. And this context is important to understand the
24 fence meeting because Mr. Petit is a passionate man.

25 Let's talk about what they said on direct examination.

KBDQpet2

Summation - Mr. Menchel

1 Mr. Carlton said on direct examination that Mr. Petit said to
2 him, "I know we're not supposed to be talking." In fact, you
3 heard Mr. Hartman say that yesterday; that Mr. Petit said to
4 him, "I know we're not supposed to be talking."

5 I want you to remember that.

6 He mentioned Mr. Carlton was going to meet with the
7 prosecutors.

8 The \$200,000 was part of the consulting arrangement,
9 and not for the order. A hundred percent true.

10 Working hard to get everyone back at the company.

11 Was looking forward to straightening things out with
12 the government, Mr. Petit was.

13 And on direct examination he said he understood this
14 conversation, I was supposed to say, it's the consultancy.
15 It's a five-minute meeting.

16 I want you notice what's not there. There was no
17 testimony about pressure. He just said, "Look, the guy told me
18 the story. I didn't think it was right. I understood he was
19 telling me to say it was for the consultancy." He never uses
20 the word "pressure" once. If you have any questions, ask his
21 Honor to have this read back to you. You can have any part of
22 this transcript -- I think his Honor is going to instruct you
23 on this -- read back or provided in some manner. I urge you to
24 do it if you don't think this is correct because it is.

25 Next.

KBDQpet2

Summation - Mr. Menchel

1 On cross-examination, the full story comes out. Not
2 just the cherry-picked pieces that the government wanted to
3 elicit. First of all, when I asked him, you may remember this:
4 I said, "I don't understand, you're both not in the company.
5 Nobody's been charged with a crime. Why can't you speak to
6 each other?"

7 He completely reverses and says, "Well, my counsel
8 told me I shouldn't be having contact with Mr. Pete."

9 So the story changes from Mr. Petit said, "I know we
10 shouldn't be talking" to Mr. Carlton saying, "Well, I was the
11 one that thought we shouldn't be talking, and Mr. Petit only
12 implied we shouldn't be talking."

13 I don't know how you imply that, but it's another
14 example of what's going on in this case: Evidence by way of
15 implication, supposition, assumption, understanding, belief.
16 We don't convict people on that. We convict people on hard
17 evidence.

18 This wasn't brought out on direct examination because
19 it doesn't fit their theory that he was trying to just pressure
20 him. He tells him to hang in there. Then he said something to
21 him, Mr. Petit did, about standing your ground. And when he
22 was asked in his own words what that meant, standing your
23 ground, he said, "Don't let them pressure you into saying
24 something you wouldn't otherwise say." And the testimony on
25 this was Mr. Carlton understood Mr. Petit was telling him don't

KBDQpet2

Summation - Mr. Menchel

1 let the government when you go up there pressure you into
2 saying something you wouldn't otherwise say. If this man was
3 ever more pressured in his life, it was in this moment. He was
4 afraid of exactly what happened, and all he was telling
5 Mr. Carlton was, these guys have a lot of pressure and power.
6 Don't let them pressure you. This is what Mr. Carlton said on
7 cross-examination. I didn't put these words in his mouth. The
8 word "pressure" is the word he used, Mr. Carlton, what he
9 understood Mr. Petit was telling him not to fall subject to
10 with the government.

11 And then he goes on. He pulled out a list of probably
12 ten other things to show he was going to rigorously defend
13 himself. And the \$200,000, the consultancy was in a list of
14 probably ten other things he was saying. You didn't hear that
15 on direct examination. It made it sound like this whole
16 meeting was about, "Psst, listen, you go up there, tell them
17 it's for that." This man was rigorously defending his
18 position. Does that make him guilty of a crime?

19 You know it's not easy to stay silent for five years
20 while people sling accusations against you. He made his
21 position known. And Mr. Petit I brought out never asked him to
22 lie, shade or minimize.

23 Next, please.

24 Then we have the redirect examination. This was a
25 pretty explosive moment. They just put the words in his mouth

KBDQpet2

Summation - Mr. Menchel

1 though. Remember, on cross-examination, the word pressure was
2 in reference to the government. On redirect in a leading
3 fashion where the word pressure is being put into Mr. Carlton's
4 mouth, he, of course, adopts it.

5 "By the way, is there someone in this courtroom who's
6 pressured you not to tell the truth?

7 "Not to tell the truth to the government?

8 "Yes.

9 "Who was that?

10 "Pete.

11 "Is that Mr. Petit?

12 "A. Yes."

13 Folks, what do you expect him to say? He knows at any
14 moment they can prosecute him if they're not happy with his
15 testimony. But when he was given a chance in his own words to
16 say what happened at that fence meeting, both on direct and
17 cross, he never once said Mr. Petit pressured him. That's a
18 word chosen by the prosecutors which he understands, just like
19 Schultz, did I have to accept.

20 What else were we shown? You know this document is
21 like a metaphor for this case. Just so you understand so this
22 is clear, and I think it was brought out during the trial, the
23 rest of this is redacted, meaning it's been taken out. What is
24 this document? It's a press release.

25 (Continued on next page)

Kbd3pet3

Summation - Mr. Menchel

1 MR. MENCHEL: (continuing) It shows the former
2 chairman and CEO Pete Petit issued the following statement to
3 fellow shareholders.

4 Folks, this is literally Mr. Petit's statement to the
5 world. It's not some secret handwritten scrawl that he's
6 feeding to Mr. Carlton about his position. He's telling it to
7 the world.

8 Can you go to the right, please. Of course the
9 government, just like everything else in this case, wants to
10 cherry-pick out the piece that they think fits their case.
11 Mr. Petit made the point the distributor who obtained the
12 consulting agreement. Thank you.

13 So, also important to understand that that press
14 release, which you didn't learn about until we did the recross,
15 was in a stack of articles about 3 inches thick in a book. If
16 Mr. Petit wanted to make sure that Mr. Carlton was going to
17 know to say this, he was going to have to dig deep through a
18 lot of material just to find that one sentence. That's absurd.

19 Let's talk about Stability. Next slide. You know
20 this man, Mr. Martin, testified under a non-prosecution
21 agreement. What that basically means is he's getting a free
22 pass. Unlike Carlton and unlike Brooks, he knows he is getting
23 a free pass. All he has to do is play ball. If he cooperates
24 and tells the truth as they decide it to be -- he admitted
25 this -- they get to decide if he's truthful. And if they think

Kbd3pet3

Summation - Mr. Menchel

1 he is, they won't prosecute him. If they think he isn't, they
2 will.

3 That's not just for what happened in this case. It
4 was to get him off the hook for a completely unrelated fraud at
5 a company called Osiris. Totally rehearsed. Did not need,
6 could not sell, couldn't pay, didn't really want. Another
7 example of people who have been primed to just throw these buzz
8 words into their testimony. Next slide, please.

9 You didn't learn about this on direct, but on
10 cross-examination we showed you the kind of man they are asking
11 you to rely upon to convict Mr. Petit. The only real evidence
12 about Stability is Brian Martin. That's the only evidence
13 against Mr. Petit, is that man's word. That man's word is
14 worth zero. He is a pathological liar. This document shows
15 it.

16 At the same time he was committing fraud with Osiris,
17 he was defrauding them. You got to give him credit. He's
18 working all the angles. And when he is asked who is Dover,
19 Dover is some old Stryker reps but my wife is helping them.
20 Total lie. And he wouldn't admit on direct, on
21 cross-examination, that he was desperate to replace the Osiris
22 product. You know why he wouldn't admit that? Because that
23 doesn't buy into the government's theory that he really needed
24 the product that Mr. Petit was asking him to buy. But you
25 learned during the stipulation that was read yesterday, that at

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Summation - Mr. Menchel

1 earlier meetings that's exactly what he told the prosecutors,
2 and I'll leave it to you to decide what is the truth, what he
3 told them early on or what he said two days ago in court. I
4 think it's obvious that what he said early on is the truth.
5 Next, please.

6 This is real time documents showing that Stability was
7 more than interested in buying this product. Next slide,
8 please.

9 To Tom Johnston, you heard he is the number two guy
10 there. It's time to get to work selling product. This is
11 September 29 when they are making this order. At your earliest
12 convenience, I need to obtain market collateral and get the
13 processes in place for our sales staff.

14 Is that someone that's not interested in buying
15 product? Really. Either they're lying, which, with Mr. Martin
16 is possible, or this is really the truth. Either way, from
17 MiMedx's point of view, they were clearly expressing a desire
18 to buy this product and move. Next slide, please.

19 Remember the whole 4 millimeters, didn't want it,
20 couldn't sell it. He is talking here about how he's going to
21 price it. You don't waste your time, waste a product, if you
22 don't want it and all you are going to do it is return it.

23 I submit to you, you should trust these documents and
24 not a word that comes from Mr. Martin's mouth.

25 They made a big deal about the fact that Mr. Martin

Kbd3pet3

Summation - Mr. Menchel

1 had very little cash or even a negative cash balance and
2 therefore couldn't have paid for the product in time. You also
3 learned in this case a couple of things. One, there were
4 tremendously sales, okay. 2013, 20.7 million, and by 2015, the
5 very year in which he's asked to make this \$2 million purchase,
6 he had projected to MiMedx they were going to get \$27 million.
7 Let me ask you, is it crazy that Mr. Petit would say, if you
8 want to be a distributor let's start with 2? Why is that
9 crazy? That's less than one-tenth of what this man projected
10 he would do in a year. He is asking him to buy it for the
11 quarter. Next slide.

12 He's showed how much money they were making in sales
13 every month in 2015. Almost close to 2 million in some cases
14 and that's just a month. Mr. Petit is asking him to buy
15 product for a quarter, which is three months. Mr. Petit is
16 asking him to buy one-third approximately of what he can sell
17 in three months. This was not an outrageous number. It was
18 not shocking in any way.

19 So what did they do. They spun another narrative with
20 you which is totally false. The prosecutors and Mr. Martin
21 wanted you to believe that Stability Biologics had a year's
22 worth of product from Ovation, and therefore there was no way
23 they were going to be able to sell it for at least a year.
24 That was the implication they left you with. Now, before we
25 even get to the hard proof, if you have a year to go to sell

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Summation - Mr. Menchel

1 the product you have, why would you be entering into a
2 distribution agreement with another company? Makes no sense.
3 Why not say, I'll see you guys in a year, I've got a year's
4 worth of product to sell first. On its face it's nonsensical,
5 but there was hard proof to the contrary. Next slide, please.

6 He was specifically asked by people at MiMedx what
7 about all this inventory that you have with Osiris? Our
8 understanding is that all of it, all of our existing inventory
9 can be returned. We have returned both Ovation and Grafix in
10 March, April, July, August and October without any questions
11 from Osiris.

12 When I asked about that he goes, yeah, but I think we
13 might have had a problem going forward. Do you believe that?
14 More importantly, do you believe that was the impression he led
15 Mr. Petit or anybody else at MiMedx to believe? This is the
16 man that told you he told Mr. Petit we can't sell this product.
17 What are you going to believe, Brian Martin or the document he
18 actually wrote at the time when he had a motive to be truthful?

19 I submit to you there is not one thing Brian Martin
20 said in this case about what he said Mr. Petit told him that
21 you can trust. His Honor will instruct you that reasonable
22 doubt is probably the most important instruction in this case.
23 Requires you to think about the type of doubt you would have in
24 the most important decisions of your own personal life. I'm
25 paraphrasing, but that's roughly what he is going to say.

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Summation - Mr. Menchel

1 I ask you: Would you trust Brian Martin in the most
2 important of your own personal affairs beyond any doubt? Would
3 you? If the answer to that is no, Mr. Petit is entitled to no
4 less. Next, please.

5 This one's another example of the government just out
6 of whole cloth bringing in the auditors.

7 Based on your conversation and the timing, what relationship
8 was there between the request?

9 Again, the magic phrase: It was my understanding, because Pete
10 Petit never said this, so he is going to talk about what is in
11 his own head and tell you to believe that what is in his head
12 is what Mr. Petit said.

13 It was my understanding that Pete Petit was requesting
14 to have a signed distribution agreement to validate the
15 purchases at the end of the third quarter.

16 When you say to validate, to whom did you understand
17 he needed to validate?

18 I believe he needed to validate it to the auditors at
19 MiMedx.

20 This is just spoonfed nonsense. Because the truth
21 is -- next slide. When Mr. Urbizo, the auditor, we
22 specifically asked him this question after Mr. Martin
23 testified. Because we wanted to show you that was a complete
24 falsehood.

25 "Q. There's no requirement that there be a written

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Summation - Mr. Menchel

1 distribution agreement in order for MiMedx to sell product to
2 one of its customers, correct? A written distribution
3 agreement.

4 "A. To sell something to their customer?

5 "Q. Correct.

6 "A. Yes, that's true.

7 "Q. One is not required, correct?

8 "A. A business can sell anything if they get a purchase order.
9 However they want to sell it, a business can sell something."

10 There's no desperate need for Mr. Petit to get a
11 signed distribution agreement. That's just fantasy that's been
12 created in this case. Maybe he wanted to get it signed
13 because, I don't know, it had been pending for three months and
14 he thought it was time to wrap it up. It's a contract.
15 Mr. Martin told you that. Is it unreasonable for the CEO to
16 say, hey, time to get this thing signed? Next.

17 In fact, when he was asked about this, he admitted
18 that Mr. Petit never mentioned the auditors in his discussions,
19 never mentioned accounting, never raised any of those issues.
20 That's just inside the fantasy of Brian Martin who has every
21 incentive in this case to sell you that Mr. Petit was trying to
22 commit some kind of a fraud because he asked him to sign a
23 distribution agreement, and, by the way, to pay him for some
24 product that he bought. Next.

25 And then again, just like the question about pressure,

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Summation - Mr. Menchel

1 a leading question is put by the prosecutors on redirect that
2 was never mentioned on direct or cross-examination.

3 Did you view that essentially as a sham document?

4 Yes, I did. Yes, I believed the document was a sham.
5 I'll leave it to you to decide what real incentive did the man
6 have, except what the prosecutors wanted him to say.

7 The right of return. First of all, let me talk about
8 this for a minute. This is very, very important. There is
9 nothing illegal or improper in business about giving a customer
10 a right of return or right of exchange. Nothing. The only
11 question is, how does that count for revenue recognition. We
12 are going to talk about what that means for Mr. Petit. But
13 this is not an inherently sinister thing to do. Okay.

14 And this was the letter which they claim, by the way,
15 was secret because it was FedExed. I'm going to talk about
16 that in a second. Mr. Petit gives this man a letter with some
17 contingencies built in, and one of them is if our discussion
18 does not come to a conclusion within a reasonable period of
19 time, we'll commit to exchange and take back.

20 They were very far down the road to acquisition. So
21 Mr. Petit, was very confident that this with a basically giving
22 away ice to Eskimos. Because it wasn't going to happen. If
23 you go to the next slide, please.

24 Mr. Andersen talked about you can make a reasonable
25 estimate of return in deciding whether you can book revenue.

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Summation - Mr. Menchel

1 GAAP allows for a company to recognize revenue even when there
2 is a right of return under certain circumstances, correct?

3 Under certain circumstances, that's true.

4 Next. This was the document that Mr. Hartman actually
5 said to you yesterday was Fedexed because Mr. Petit didn't want
6 anybody in the world to know about it. Just one problem. If
7 that was true, he had his secretary draft it, and she saved
8 three different copies of it on MiMedx's computer system, and
9 then she scanned a copy to herself. He's pretty lousy at
10 hiding things if that's what he wanted to do. You would have
11 thought he would have drafted it himself or told the secretary
12 don't do the normal thing of saving documents and scanning them
13 and saving them in the system. Just send it out. Next.

14 Not only does she save the hard copies, but the other
15 thing that's also FedExed that the government ignored is the
16 distribution agreement.

17 I'm going to submit to you there is a very much more
18 reasonable explanation for why he FedExed documents. These are
19 contractual documents. He you want a handwritten signature,
20 you want the original, not an e-mail. It's no mystery here.
21 This is another example of the government finding something
22 nefarious, looking through a dirty window, and saying because
23 he Fedexed it, it must have been dirty. Next, please.

24 Your Honor, this is the perfect time to break.

25 THE COURT: All right. So ladies and gentlemen, I

KBD3PET3

Summation - Mr. Menchel

1 have to give another speech at George Washington University by
2 Zoom between 1 and 2., so we will give you an hour and 15
3 minutes for lunch, but we will resume promptly at 2 o'clock.
4 So we'll see you then.

5 (Jury excused)

6 THE COURT: Counsel, you have 35 minutes and
7 20 seconds left.

8 MR. MENCHEL: Thank you.

9 THE COURT: How long is counsel for Mr. Taylor going
10 to be?

11 MR. BURCK: Your Honor, I'm hoping to be under an
12 hour, but it will probably be, I would say we should safely say
13 an hour.

14 THE COURT: Okay. So, I think we'll probably have the
15 government's rebuttal on Monday then. Looks like the way we'll
16 wind up. Okay. Very good. We'll see you at 2 o'clock.

17 (Recess)

18 (In open court; jury not present)

19 THE COURT: The jury is on its way up and we'll
20 recommence as soon as they're here.

21 MR. MENCHEL: Your Honor, if we do finish, if I
22 shorten this, do you think we can get the whole thing done
23 today?

24 THE COURT: No.

25 MR. MENCHEL: Okay. I won't, I'll take my time.

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Summation - Mr. Menchel

1 THE COURT: Let me say this. If the government had a
2 strong interest in that, I would consider it. But my own
3 feeling is that the jury can only absorb so much on a given
4 day.

5 MR. IMPERATORE: Your Honor, I can certainly begin it
6 today. I mean, I think I will need the full 45 minutes, but I
7 can certainly begin it.

8 THE COURT: All right. Well, let's see how it goes
9 then.

10 And here is the revised charge, the only change was
11 the one we discussed.

12 MR. IMPERATORE: One issue we wanted to raise is, we
13 think it's appropriate for the Court to give an instruction on
14 redactions. Defense, there was a document that was admitted
15 into evidence, and was shown in summation, and defense made a
16 number of insinuations about the redactions.

17 THE COURT: I was a little surprised at that. I was
18 also surprised you didn't object right then be there.

19 MR. IMPERATORE: Well, we're --

20 THE COURT: I'm not saying you were required to. So,
21 something along the lines of documents are often redacted,
22 meaning parts of them are eliminated before you see them,
23 because of rules of evidence that come into play. It has
24 nothing to do with anything else. Something along those lines.

25 MR. HARTMAN: I think generally the instruction is

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Summation - Mr. Menchel

1 you're not to speculate as to what's behind the redactions.

2 THE COURT: I never give that instruction, because I
3 always thought that's an invitation to speculation.

4 MR. HARTMAN: I think you're right.

5 MR. MENCHEL: I thought when the document was
6 received, you did give an instruction on this. I'm almost
7 positive.

8 THE COURT: Well, I think it is appropriate to say a
9 brief word on that.

10 MR. MENCHEL: You are going to do that now?

11 THE COURT: Now. Yes.

12 MR. MENCHEL: Okay.

13 MR. PACKARD: May I approach to speak with the AUSAs
14 for one moment?

15 THE COURT: Yes.

16 MR. IMPERATORE: The defense just alerted us to an
17 argument they may want to make through the closing of
18 Mr. Taylor's counsel. It relates to an exhibit, Defense
19 Exhibit 636.

20 THE DEPUTY CLERK: Jury entering the courtroom.

21 THE COURT: To be continued.

22 (Jury present)

23 THE COURT: So, ladies and gentlemen, I just wanted to
24 mention, and this is not a matter of great moment but just so
25 you are aware of it, there was a reference in the summation

KBD3PET3

Summation - Mr. Menchel

1 this morning to a redacted document, meaning a document where
2 certain portions of it had been removed and you only get to see
3 the rest of it.

4 That's done because of the rules of evidence. It has
5 nothing to do with any of the parties' strategy or anything
6 like that. That is totally a function of the rules of evidence
7 applied by me. These rules, which you've fortunately been
8 spared, are why people keep saying "objection" during the
9 course of the trial. They're very important rules, and they
10 come down to us, frankly, from early English time.

11 But that's the reason for redactions, nothing to do
12 with strategy or anything else. Counsel.

13 MR. MENCHEL: Thank you, your Honor.

14 May it please the Court.

15 THE COURT: Please.

16 MR. MENCHEL: If we can start again, Ray, with SLR.
17 I'm going to move now and discuss with you SLR. Next slide,
18 please.

19 So what do we know about SLR? SLR, as you learned in
20 this case, was a trusted distributor that was already in
21 existence, but when Jerry Morrison decided to join with his
22 wife, the whole purpose of this was to take over from CPM, the
23 company that you heard they had so much trouble with in what
24 was in fact the biggest market for MiMedx, Texas. It made
25 perfect sense from MiMedx's point of view to do all that it

KBD3PET3

Summation - Mr. Menchel

1 could to support Jerry Morrison.

2 This is another example of what I'm talking about, how
3 a sinister gloss is being put on things like giving an employee
4 who is leaving to start a business that you'll be in
5 partnership with a severance package is somehow sinister or
6 wrong. There is no evidence that that's true. Simply none.
7 It made perfect sense for Mr. Petit to want to support Jerry
8 Morrison, because he was a good employee of the company, who
9 was transparent, who was honest, who knew this market. And so,
10 for that reason, okay, and Mr. Petit decided he was going to do
11 all he could to help him. You saw documents to that effect,
12 and he won't let Jerry fail, as if that's something nefarious
13 or wrong.

14 It was in the interest of MiMedx to find a distributor
15 that they could trust, that they could work with, who was not
16 going to cause all the headaches that CPM had caused. Nothing
17 nefarious or wrong about that.

18 OrthoFlo, you heard about, was an exciting new
19 product, and in particular it was believed it was going to be a
20 huge hit and big opportunity for MiMedx in Texas. Next slide,
21 please.

22 So Mr. Petit made a business bet on Mr. Morrison.
23 Something that businessmen do all the time. They weigh the
24 risk versus the opportunity and they make a decision. And in
25 this case, he explained right to the audit committee in

KBD3PET3

Summation - Mr. Menchel

1 response to the allegations from Mr. Andersen about SLR, why he
2 had made that business judgment.

3 First, it's important to understand that CPM had
4 generated revenues in the \$7 million number a year for MiMedx.
5 As I said, this was their biggest distributor. These are all
6 the things he wrote, in having SLR become our distributor,
7 assuming he would resign, as we thought through his
8 qualifications we came to the conclusion this would be a very
9 logical solution. He goes on to say, as far as we could tell,
10 CPM carried an average inventory of about \$4 million. That's
11 very important. Because a lot of the points the government is
12 making is that the order that Mr. Morrison had was obscenely
13 high. Well, he is slotting in to take over the business of
14 CPM. Right here you're learning that CPM at any given time was
15 carrying about \$4 million in inventory. The order was roughly
16 the same amount as what it was CPM had on hand when they were
17 the distributor for MiMedx.

18 Something else that was covered briefly but that's
19 important for you to understand in the context of Mr. Petit's
20 way of thinking. You learned a little bit about something
21 called reserves. And this was asked of Mr. Urbizo:

22 "Q. What are reserves in a nutshell?

23 "A. Reserves are basically estimates made by management for
24 the accounting function to account for events where you don't
25 know exactly how it's going to play out."

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Summation - Mr. Menchel

1 There is no question at all that SLR was a risk. But
2 it was a risk that Mr. Petit, with all of his years of business
3 experience, felt was an appropriate risk to take.

4 I submit to you one of the things that would give a
5 man like Mr. Petit comfort was the fact that they had reserves.
6 Money that had been set aside in case things didn't go well.
7 You saw evidence of that. And how, over time, MiMedx's
8 reserves would go up to cover any additional risks that they
9 were taking. This is good business sense.

10 Again, the issue in this case is whether or not, in
11 Mr. Petit's mind, taking a bet on Jerry Morrison was somehow
12 criminal or done for fraud. And one of the things you should
13 consider is that the company, MiMedx, was well reserved at
14 exactly the moment in time SLR was coming into existence.

15 I'm going to talk a little bit about the freezers.
16 This is another example of something being put into a nefarious
17 spin as though it's somehow wrong for the manufacturer of a
18 product to assist one of its distributors in having -- I'm
19 sorry, was there an objection?

20 THE COURT: No. I was just coughing, I'm sorry.

21 MR. MENCHEL: No problem.

22 As if there is something wrong with assisting a
23 distributor in setting up the storage facilities that they're
24 going to need in order to carry a product.

25 Again, what you know about life, what you know about

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Summation - Mr. Menchel

1 business, it is common, okay, for manufacturers of goods to
2 assist the sellers of those products in setting up facilities
3 that enable them to sell the product that they sell. Nothing
4 nefarious or wrong about that at all. And the way you know
5 that is these freezers were not hidden from accounting. You
6 were aware that some part of his order was not being shipped,
7 but rather was going to be stored in freezers at a different
8 location, correct? Yes, I was aware that there was a buy and
9 hold circumstance.

10 That's what buy and hold means. I am buying it but
11 it's being held by somebody else on my behalf. Normal business
12 behavior. Something that was not hidden from Mr. Andersen or
13 accounting at all. Nor was the consulting arrangement that had
14 been set up hidden from accounting. We already went over these
15 consulting agreements. This was clearly a way to develop a
16 relationship with a distributor, and to help them out and there
17 is absolutely nothing wrong with that.

18 Mr. Andersen actually saw the money that was leaving
19 MiMedx going out the door to Mr. Morrison's checks. It was
20 logged in the company's financials. Nothing was hidden,
21 nothing nefarious.

22 Here is something else that's important for you to
23 understand. It was the suggestion in this case that somehow
24 SLR was on life support. That without these small payments of
25 consulting fees, they would not have survived. Well, this is a

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Summation - Mr. Menchel

1 record of the amount of money that they were holding at any
2 given time, and I want to focus in on December of 2015.
3 Because this is the moment in time when he gets that loan that
4 you heard about, that Torpin loan. He takes that working
5 capital and he uses it to pay off the product that he owed
6 MiMedx. What's wrong with that? Companies take out loans all
7 time to fund their capital. Mr. Martin testified that they had
8 a capital loan that they were using to develop part of their
9 business. There is absolutely nothing wrong with having a loan
10 in order to finance your business.

11 What's important is, that money went in and out. In
12 December of 2015, went to Mr. Morrison, got paid, as part of
13 the money that they owed to MiMedx. And look what happens, his
14 numbers continue to rise. This 721,000 and this 918,000,
15 that's not from the loan. The loan was used to go in and go
16 out. That's money he's making on the sale of the products.

17 I submit to you that Mr. Petit was right. He was
18 shown to be right in taking a chance on Mr. Morrison. Because
19 you can tell by this chart, his business was taking off. It
20 was working.

21 Let's talk about the loan. It is not a crime to
22 assist somebody in setting up their business, especially when
23 you think that the success of his business is going to benefit
24 you. We've gone over this already. SLR was stepping into the
25 shoes of CPM, their largest distributor. Mr. Petit using his

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Summation - Mr. Menchel

1 business judgment, thought this is a guy I don't want to fail,
2 because if he succeeds, we succeed. Nothing dirty or nefarious
3 about that.

4 And it was suggested in some of the questions that the
5 government asked that the fund, the generations skipping trust,
6 had been set up for the purpose of funding Mr. Morrison's loan.
7 That's just not true. This trust, if you look on the bottom,
8 was set up years before there was any loan from Mr. Petit's
9 children to Mr. Morrison, in September of 2012. I don't think
10 there's been any real testimony on this, just some documents,
11 but so you understand, this is not Mr. Petit's money. When you
12 set up a trust like this, and you give money to your children,
13 it's their money. Not his. But there's been some suggestion
14 about how children were pressured. You've heard zero evidence
15 of that in this case. There is not even a single document that
16 supports that in this case.

17 These are adults; they're not kids. There is no
18 question Mr. Petit put them together, absolutely. We've never
19 run from that. He's never pretended that wasn't true. The
20 issue, and we'll talk about it in a minute, is whether he
21 thought he had to disclose that in any way to the auditors at
22 MiMedx. We're going to talk about that. Next, please.

23 This was not some sham agreement. This was actually
24 an arm's length negotiation between Mr. Campbell and
25 Mr. Morrison. Did Mr. Petit play a role in it? Absolutely, he

KBD3PET3

Summation - Mr. Menchel

1 played a role in it. He helped set it up.

2 But if you look at the rest of the e-mail that was
3 quoted yesterday by Mr. Hartman, he says, Mr. Campbell does, in
4 general, I'm not a huge fan of loaning money. I think that's
5 what banks are for. He goes on to say -- this part wasn't read
6 yesterday -- might need a hefty equity penalty if note is not
7 paid in full by due date. This is something he was clearly
8 considering. Not being pressured. Considering to do. You
9 have heard no evidence that this went south in any way or this
10 went bad. There is no evidence one way or the other on that
11 point.

12 This is the important point. The government wants you
13 to assume that Mr. Petit, who is not an accountant, he's a
14 businessman, but he's not an accountant, should understand that
15 each one of these things he has to affirmatively disclose,
16 somehow he should magically know that all these things are
17 required to be disclosed.

18 You remember Mr. Andersen was asked this question.
19 "As it relates to any loan from any party or bank or otherwise,
20 you never told Mr. Petit that he had a duty to disclose that to
21 accounting if he ever learned of how a customer was financing
22 its payments, right?

23 "Answer. No, I never said that to Mr. Petit."

24 For all you know, all these distributors have some
25 form of financing or loan arrangements. No evidence in the

KBD3PET3

Summation - Mr. Menchel

1 record that's somehow something that the company was aware had
2 to be disclosed to the auditors. What's important is are they
3 paying their bills. And whether the loan came from Citibank or
4 it came from a private loaner like Mr. Petit's children, you
5 know banks aren't the end-all-be-all of how people get loans.
6 They are a relatively low risk institution. You might have
7 heard of hedge funds, private equity funds, these people are
8 willing to take risks where banks aren't. That same thing with
9 people like Mr. Petit's children.

10 When accounting asked the questions, they got answers.
11 "You never asked a question to Mr. Petit that he refused to
12 answer for you with respect to Stability's due diligence and
13 acquisition?

14 "That's correct I never asked a question of Mr. Petit that he
15 refused to answer."

16 This is important. It goes to his good faith. There
17 is no evidence in this case of evasiveness. They tried to
18 suggest that when he sent this letter and distribution
19 agreement, that was hidden from the auditors because you
20 wouldn't find it on the computer's server system. Not true.
21 We already showed you Pam Martin scanned this thing, made
22 drafts, it was kept in the ordinary course of business at
23 MiMedx. This is important to Mr. Petit's good faith.

24 They have to prove to you -- we don't have to defend
25 against it -- they have to prove to you that this man did

KBD3PET3

Summation - Mr. Menchel

1 something with the intent to commit fraud. Just no evidence of
2 that in this case.

3 Let's talk a little bit about the accounting. Before
4 we get there. Accounting is a complicated thing. Mr. Hartman
5 tried to suggest to you yesterday you don't need to be an
6 accountant to understand these things. One of the examples he
7 gave you was, why would you ship product to somebody if you
8 know you are going to get it back. It costs money and time and
9 effort to ship product. And he used CPM as an example.

10 But CPM is the perfect example of why you would ship
11 product to somebody. Because as it turned out, of the \$2.1
12 million order, only \$392,000 worth of product was returned.
13 Again, use your common sense and life experience. When you
14 ship out product, you may expect a certain amount will be
15 returned. You've heard about that, that should be accounted
16 for. But whenever you're shipping out something, there is
17 always a risk something could be returned. You make a business
18 judgment about whether or not that makes sense to do it, and
19 that's what he did. There is nothing inherently wrong with
20 that, there is nothing inherently wrong with extending payment
21 terms. The only issue in this case is do those things affect
22 the treatment of revenue recognition, and would Mr. Petit, a
23 non-accountant, know that. There has been no evidence that he
24 would. Next slide, please.

25 Accounting is complicated. Mr. Andersen admitted as

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Summation - Mr. Menchel

1 much.

2 "Q. You also testified yesterday that on occasion when an
3 accounting matter would cross your desk, before opining on that
4 matter, you would need to conduct some additional research on
5 that matter, right?

6 "A. That's often the case, yes.

7 "Q. Talk to experts about the matter, right?

8 "A. On complicated things, yes.

9 "Q. Because accounting is complicated, right?

10 "A. Accounting can be complicated, yes."

11 It's reasonable to infer that Mr. Petit left the
12 accounting to the accountants. He is the CEO of the company.
13 He knows a lot of things. But if you know anything about a
14 CEO, they're like the general. Their knowledge is very wide,
15 but not necessarily very deep. That's why you have lawyers and
16 accountants and other people who are good in their fields to
17 assist you in the business. Next, please.

18 This is something that again we talked about the blue
19 backpack and the red backpack. It was understood -- wrongly,
20 as it turned out -- that when you exchange products, it was
21 revenue neutral. This is an e-mail from Mr. Schultz. Okay.
22 And he was asked about it.

23 "Q. I want to make sure I got an answer to this piece of the
24 question. Those exchanges were always for equal amount, the
25 same amount of money out and the same amount coming back,

KBD3PET3

Summation - Mr. Menchel

1 right?

2 "A. Yes.

3 "Q. Revenue neutral.

4 "Q. The question, sir, was revenue neutral, right?

5 "A. Yes."

6 This was a commonly held belief at MiMedx. And it
7 turned out that in certain circumstances it's right, and in
8 certain circumstances it's wrong. And that's why you have
9 people who specialize in these fields, to advise you.

10 It's also a profession of opinion and judgment. This
11 is not like just adding up numbers from one column to the next.
12 That's not what accrual accounting is. It's more complicated
13 than that.

14 Mr. Andersen was asked, "Deciding what's reasonable is
15 a question of judgment, correct?"

16 "A. Yes.

17 "Q. It is a question of discretion, correct?

18 "A. In the GAAP criteria, it requires generally speaking a
19 history of returns experience. It has to be contemplated and
20 then you apply experience on top of that.

21 "Q. And it's up to the accounting professionals to apply their
22 judgment to reach that answer, correct?

23 "A. That's correct."

24 You learned in this case that even accountants, people
25 who are CPAs, can look at the same set of facts and come to

KBD3PET3

Summation - Mr. Menchel

1 different conclusions about whether or not something should or
2 should not count as revenue. Mr. Andersen testified:

3 "Q. And you told them facts that made you believe that a sale
4 of product to Stability Biologics did not meet GAAP revenue
5 recognition criteria?

6 "A. That was part of the discussion.

7 "Q. They didn't challenge your account of the underlying
8 facts, did they?

9 "A. I'm not sure that they challenged -- they didn't say the
10 facts that I had were wrong with those conversations.

11 "Q. No, they just disagreed with you about whether those facts
12 prevented MiMedx from recognizing the revenue from those sales?

13 "A. I think that, yeah, they definitely disagreed on how to
14 recognize revenue."

15 If accountants, people who are trained to do this, can
16 have disagreements about whether or not a transaction should or
17 should not be recognized as revenue, you ought to question how
18 Mr. Petit, experienced as he is but not an accountant, should
19 know all these things. This is not as simple as the government
20 wants you to believe. It's complicated, and open to opinion
21 and judgment and discretion.

22 You heard evidence in this case, in fact, that the two
23 top accountants at MiMedx, Mr. Senken the CFO, and Mr. Andersen
24 who was the controller, disagreed.

25 "Q. When you met with them after sending the e-mail, what, if

KBD3PET3

Summation - Mr. Menchel

1 anything, did Mr. Senken say to you?"

2 This was on direct examination, by the way.

3 "A. He said that, a number of things. This was normal course
4 of business, this is what they'd always done, and that I didn't
5 understand all the facts and circumstances, that the accounting
6 was correct. He told me that in the course of those meetings
7 that my concerns had been shared with the external auditors,
8 with the audit committee and with the external counsel, and
9 that none of them agreed with me, and that my conclusions were
10 wrong."

11 Folks, what's important here is that it really doesn't
12 matter who is right or wrong for the purposes of this trial.
13 This just gives you insight that this is not as cut and dried
14 and easy to understand as the folks at that table want you to
15 believe. It's not.

16 "Q. Mr. Senken also told you that everyone he discussed it
17 with disagreed with the concerns you raised in this e-mail,
18 correct?

19 "A. That's correct."

20 It doesn't mean that Mr. Andersen is right or wrong.
21 It just shows you this is a subjective, opinion-oriented type
22 of profession when you are dealing with accrual accounting.

23 I want to talk about the law and how it relates to the
24 government's burden. The government has to prove beyond and to
25 the exclusion of every reasonable doubt that Mr. Petit acted

KBD3PET3

Summation - Mr. Menchel

1 not only unlawfully, but knowingly, willfully, and with a
2 specific intent to defraud. That he made materially false and
3 materially misleading statements.

4 And I submit to you that there is very -- there is no
5 evidence in this case that Mr. Petit acted knowingly,
6 willfully, or at all with any specific intent to defraud.

7 Conspiracy, similar concept. Has to prove that he
8 intentionally joined and participated in such a conspiracy.
9 Next, please.

10 What do these words mean? Knowingly means to act
11 consciously and voluntarily, rather than by mistake or accident
12 or mere inadvertence.

13 Intentionally and willfully mean to act deliberately
14 and with a bad purpose, rather than innocently. Next slide,
15 please. We can skip over that one. Next slide, please. I'm
16 sorry. Go back. Next slide.

17 This is important. It went quickly, but it's
18 important for you to understand that MiMedx did publicly
19 disclose when things weren't always going their way in their
20 filings. Again, it speaks to Mr. Petit's good faith. One of
21 the things you learned from Mr. Docter, who was one of the
22 investors who testified, was that, in fact, the DSOs were going
23 up in this case. The DSOs are the number of days outstanding
24 before someone pays you. And Mr. Docter, using his experience,
25 explained why that could happen. You'd have to know who their

KBD3PET3

Summation - Mr. Menchel

1 customers are, and if there is a different mix of customers
2 from one period to the other, because some customer take longer
3 to collect from. Some companies don't even bill until 45 days
4 after you recognize revenue, so all those things figure in.

5 The very things we're dealing with in this case,
6 extension of payment terms, when people pay, all of the things
7 that the government says are so set in stone, Joseph Docter
8 understood doesn't work that way in the real world. He
9 understand that the days outstanding numbers could be going up,
10 which the company fully disclosed, and yet there could be
11 legitimate reasons for why that happens.

12 They publicly disclosed this on a phone conversation,
13 on a conference call you heard yesterday. Mr. Senken -- you
14 heard this played live. He's asked about the DSOs. He says,
15 "As Bill mentioned, and I don't like to bring this out in case
16 any customer is listening," let me stop you there. What he's
17 saying is in case any of the distributors or people that buy
18 our product are listening, "but we target around 75 days." In
19 other words, what he's saying is, yes, we have payment terms of
20 30 days, we have payment terms of 60 days. But we realize that
21 in the real world, and he's disclosing this to the investing
22 public, our internal target is 75.

23 This speaks to the whole issue of flexibility that we
24 have been talking about throughout this trial. And he says,
25 "We were doing better than that. It's not that we offer

KBD3PET3

Summation - Mr. Menchel

1 extended terms, we don't. We haven't changed our terms,
2 whether that be a distributor or otherwise." But then he goes
3 on to say, "Even though our terms say we don't care if you
4 don't get reimbursed, you still owe it to us." Let me stop you
5 there. What he's saying is even though you bought the product
6 from us, it's not our problem whether you get paid for yours,
7 you owe us. He goes on to say, "Practically speaking, the
8 payments are a reflection of how quickly they get reimbursed.
9 And that's a big part of what's happening." What he's saying
10 is, yes, we have payment terms, but we know, just like with
11 Brian Martin and with Jerry Morrison, we're not really going to
12 get paid until they get paid, and that's a big part why our
13 DSOs are going up, and we're okay with that.

14 His Honor told you at the beginning of the case one of
15 the disputed elements is whether or not Mr. Petit and
16 Mr. Taylor acted with fraudulent intent. Let's discuss that.
17 He's also going to give you an instruction on what good faith
18 and lack of intent mean.

19 First of all, Mr. Petit's good faith is a complete
20 defense to both of the charges here. If the defendant you are
21 considering believed in good faith it acted properly, even if
22 he was mistaken in that belief, and even if others were injured
23 by his conduct, there would be no crime.

24 Going on, while each of the defendants assert a good
25 faith defense to both charges, keep in mind the defendant has

KBD3PET3

Summation - Mr. Menchel

1 no burden to establish his good faith since he is presumed
2 innocent. Rather, as to each charge, the burden is always on
3 the government to prove guilty knowledge, criminal intent, and
4 lack of good faith on the part of the defendant, beyond a
5 reasonable doubt.

6 It is a very high burden those folks have. When you
7 think about all evidence you've heard in this case, when you
8 put away the bribe nonsense, which is just not true, what
9 evidence is there that Mr. Petit acted with a guilty conscious?
10 Zero. Next, please.

11 In fact, the evidence provings the opposite. That he
12 was acting in good faith. Even though we have no burden,
13 that's what the evidence showed. The \$200,000 payment that
14 they made so much about in this case was disclosed to Lexi
15 Haden, was disclosed to Mike Senken. Nothing was hidden,
16 nothing was in a bag, nothing was in a shell company. It's
17 right there in black and white for everybody who is important
18 in that company to see. Next.

19 The Torpin loan as well. They made a big deal. This
20 was something that Mr. Petit was struggling somehow to keep
21 secret. He set up the meeting between Mr. Campbell and
22 Mr. Morrison in his own conference room. This is, again, where
23 life experience and common sense comes into play and why you
24 folks are in this trial. If you want to keep a loan secret
25 from your chief financial officer or your controller, do you

KBD3PET3

Summation - Mr. Menchel

1 bring the two principals of that loan into your conference room
2 where you work? That makes no sense. You only do that if you
3 don't think there is anything wrong with doing it. And you're
4 not afraid if Mike Senken down the hall walks into the
5 conference room and says, hey, Pete, what's going on here.
6 Certainly could have happened. Mark Andersen could have walked
7 in, too.

8 You have to step back and think about what you know
9 about life in this process, and when you do, things that they
10 tried to make so nefarious, like the fact that Mr. Petit went
11 out of his way to assist somebody he had been a mentor to,
12 somebody that he trusted, believed in, and more importantly,
13 believed would ultimately benefit MiMedx, there is nothing
14 wrong with putting together two parties for one to help the
15 other that might be mutually beneficial to each.

16 (Continued on next page)

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KBDQpet4

Summation - Mr. Menchel

1 MR. MENCHEL: (Continued) Next, please.

2 Stability negotiations that we heard so much about,
3 this purchase of the company which they suggested was somehow
4 nefarious. Again, in full view of the general counsel that
5 they were trying to be acquired.

6 MR. IMPERATORE: Objection.

7 MR. MENCHEL: Actually, your Honor, let me withdraw
8 that and let me rephrase.

9 I misspoke. Not acquired, there was a distribution
10 agreement being entered into between these two parties.

11 This was, I thought, one of the most --

12 THE COURT: We'll take this up after you are finished
13 You have seven minutes left.

14 MR. MENCHEL: I'm almost done.

15 THE COURT: OK.

16 MR. MENCHEL: This is I think one of the most
17 important pieces of evidence that came out in this trial from
18 Mr. Martin. When Mr. Martin was telling Mr. Petit about the
19 Osiris situation and how that relationship was set up Mr. Petit
20 referred to that as a crazy fraudulent scheme. He expressed
21 anger. He said someone was going to go to jail for this. And
22 you may remember I also asked Mr. Martin at the time:
23 "Q. Did Mr. Petit say this was going to be set up and was
24 going to be bad for Osiris?"

25 He didn't remember saying that, but we brought out in

KBDQpet4

Summation - Mr. Menchel

1 stipulations yesterday and in fact, he hadn't even really told
2 the prosecutors that Mr. Petit also said, "What happened was
3 going to be bad for Osiris."

4 Folks, if you're thinking about committing a fraud,
5 why are you expressing all of these things to Mr. Martin? That
6 makes no sense.

7 Never at one point does he say, "Oh, this Dover thing
8 is interesting. Can we work with you guys to commit the same
9 scheme?" Never once does he say that. He's expressing real
10 outrage apparently about what he heard and what he believed was
11 going to happen to these men. If Mr. Petit was doing the same
12 thing, he'd be quite a fool to be saying that in one hand and
13 doing the same thing in the other.

14 Next, please.

15 Mr. Andersen himself on direct examination first
16 brought out that he did not believe that this was a question of
17 integrity. He said that to you.

18 "This was not a question of integrity, right?

19 "A. That I said that to him, I didn't think this was a
20 question of integrity.

21 Q. Rather, he thought this was a difference of opinion on
22 accounting matters, correct?

23 "A. Yes."

24 This is not about fraud. This could be about
25 legitimate disagreements and how to apply these rules.

KBDQpet4

Summation - Mr. Menchel

1 Next, please. May I have the charge?

2 I just want to end on this note. You've heard a lot
3 of in evidence this case, and I think there's a lot of
4 reasonable doubt about what really happened here.

5 Remember, we don't have the burden to prove anything.
6 The burden stays on the government at all times to prove their
7 case beyond and to the exclusion of every reasonable doubt.
8 His Honor is going to be instructing you in detail probably on
9 Monday about what that means. Let me just end on this point.

10 When you were first chosen as jurors in this case, we
11 were in that jury room, and Judge Rakoff was presiding over the
12 jury selection process, and I listened very carefully to what
13 he said to all of you, and I actually wrote it down at the time
14 because I thought it was a very succinct way about what it is
15 to be a juror. I tried to capture it as best I could. I don't
16 know if this is word for word, but it's close.

17 He said, In the United States, we give jurors a public
18 responsibility that no other country comes close to. He said,
19 in most country criminal cases are decided by judges, but under
20 our Constitution, the determination of justice of where the
21 truth lies of whether the government has met its burden on
22 things that are far too important to be determined by anyone
23 other than ordinary citizens like yourself, who he said, come
24 together reason together to arrive at a just verdict.

25 And I submit to you, that when you really examine the

KBDQpet4

Summation - Mr. Menchel

1 reliable evidence in this case -- and by that I mean the
2 documentary evidence created at the time, versus witnesses
3 who've been pressured to say something that is now completely
4 at odds with that. When you look at what they said during
5 cross-examination and how they said it during cross-examination
6 versus direct examination, when you look at the complete lack
7 of evidence that Mr. Petit formed any intent to commit any
8 fraud, then I believe you will come to the only verdict
9 consistent with the evidence, the law and justice, and that is
10 to find Mr. Petit not guilty of both of these charges.

11 Thank you, your Honor.

12 THE COURT: Thank you very much. We will take a very
13 short sidebar on the objection that was raised.

14 (At the sidebar)

15 THE COURT: I knew I should have copyrighted my
16 remarks to the jury.

17 MR. BURCK: Yes. I just found out from my colleague
18 what the issue was. I wasn't aware what he was talking about.
19 I'm taking that out of the summation, so it's not an issue.

20 THE COURT: OK.

21 MR. HARTMAN: That's a different issue.

22 THE COURT: I'm glad to hear that.

23 And now there was an objection.

24 MR. HARTMAN: So the issue was to the slide that
25 references all the statements that Ms. Haden is on. You know,

KBDQpet4

Summation - Mr. Menchel

1 I understand that the argument was this was being done out in
2 the open, but that had been teed up already. I don't know what
3 relevance Ms. Haden's involvement would have other than this
4 reliance argument that's been sort of gestured to throughout
5 the trial.

6 I think our request at this point, Judge, is, again,
7 the sort of request -- the instruction that the Court gave in
8 the *Stoker* case, an instruction to the jury that says, you
9 know, there was an argument made about what was told to
10 counsel. You shouldn't --

11 THE COURT: I'll give them a short instruction to that
12 effect right now and then we will pick up.

13 (In open court)

14 THE COURT: Ladies and gentlemen, one other small
15 matter. There have been some documents in this case of
16 communications with the woman, who was the general counsel of
17 MiMedx.

18 You should understand, there is no defense in this
19 case of so-called reliance on counsel. There is no suggestion
20 that she was opining on the legality or illegality of anything.
21 Those emails came in because they were relevant for other
22 issues in this case, and you can consider them for all the
23 issues that are relevant in this case, but there is no defense
24 here of reliance on counsel, and you should not even speculate
25 about that.

KBDQpet4

Summation - Mr. Burck

1 OK. We will continue with Mr. Taylor.

2 MR. BURCK: Thank you, your Honor.

3 Good afternoon, ladies and gentlemen of the jury. I
4 want to thank you on behalf of Mr. Taylor for the attention
5 you've paid to this case over the last several weeks, and I
6 know the last two days have been very long ones.

7 You have a lot to absorb. I will try my best not to
8 rehash anything you've already heard other than where I really
9 need to because I know you get the case after being here for so
10 long and having heard from the government and Mr. Menchel, so
11 I'm going to do my best to be try and be very, very specific
12 with you.

13 One area I do want to repeat, and it is something we
14 really do agree with the government about: Is that common
15 sense is the touchstone for this case. Common sense. Not
16 accounting sense. Not government sense. Not lawyer sense.
17 Your common sense. That's the touchstone. That's what
18 matters. What you believe happened here based on your
19 judgment, based on your own life experience, based on what you
20 think the facts show. That is what you will need to apply
21 common sense to determine what Bill Taylor intended in this
22 case.

23 The government uses a lot of words like bribery and
24 sham and shady and cheating and greed, rhetoric, rhetoric.
25 Judge Rakoff is going to instruct you on Monday, and one of the

KBDQpet4

Summation - Mr. Burck

1 instructions he is going to give you is about rhetoric. You
2 are to perform your duty of finding the facts without bias or
3 prejudice as to any party. You are to perform your final duty
4 in an attitude of complete fairness and impartiality. You are
5 not to be swayed by rhetoric or emotional appeals.

6 When you use your common sense and you don't listen or
7 rely on rhetoric, you will find that the evidence reaches only
8 one conclusion here, which is that Bill Taylor did not commit
9 any of the crimes that he's been accused of.

10 So what is Bill Taylor doing here? Why is he here?
11 Well, let's take a look at the charges. He is accused of
12 conspiring to deceive auditors. To deceive auditors. But he
13 wasn't in the accounting department. The accounting department
14 didn't report to him. He wasn't on the audit committee. He
15 didn't make any accounting decisions. And he barely had any
16 contact at all with the outside auditor, Cherry Bekaert. He is
17 also accused of conspiring to make misleading statements in SEC
18 filings. But he had no role, none, in preparing MiMedx's
19 financial statements. And at bottom we're talking about
20 securities fraud, and there is no evidence, no evidence that
21 Bill Taylor did anything to deceive anybody about anything.

22 The government's own star witnesses, Mike Carlton,
23 Jeff Schultz, they said it plainly: Bill Taylor never told
24 them to lie to anybody. He never told them to withhold
25 information from anybody -- not from accountants, not from

KBDQpet4

Summation - Mr. Burck

1 MiMedx, not from any one.

2 Bill Taylor didn't do what the government accuses him
3 of doing, and you will see that after you go back and
4 deliberate, look at all the evidence, and use your common
5 sense.

6 Now, let's talk about the evidence and let's leave
7 aside the rhetoric.

8 What was Bill Taylor's job? You've heard a lot about
9 it, but I just want to remind you. He ran the company's
10 operations. He was the chief operating officer. This is a
11 chart you saw way at the beginning of the trial. You see a lot
12 of people under him. He's got a lot of hats. Running the
13 operations of a company is complicated, lots of different
14 things you're running. But you know one of the hats he didn't
15 wear -- accounting. Accounting was run by somebody else,
16 Michael Senken. You've heard that name quite a bit in this
17 trial as well, and he had a bunch of people helping him about
18 accounting and finance. Bill was not part of that group. And
19 Bill Taylor -- excuse me -- Michael Senken did not report to
20 Bill Taylor. This is a chart again you saw at the very
21 beginning of the trial. Bill Taylor and Michael Senken are at
22 an equal level. Accounting does not run through or to Bill
23 Taylor.

24 You also learned that Bill Taylor is not on or was not
25 on the audit committee at the company. Shouldn't be surprising

KBDQpet4

Summation - Mr. Burck

1 since he doesn't have accounting as one of his functions.

2 Matthew Urbizo, who you saw testify a couple days ago told you
3 that. There's no dispute about that. He wasn't on the audit
4 committee, and he barely had anything to do with Cherry Bekaert
5 or Matt Urbizo or anyone else from the audit. Matt Urbizo told
6 you that:

7 "Q. You had very little interaction with Bill Taylor?

8 "A. I did not interact with Bill Taylor much at all."

9 That was Matt Urbizo two days ago.

10 Bill Taylor had no role in preparing the company's
11 financial statements. None. Matt Urbizo told you that as
12 well. He didn't certify, meaning he didn't say these are
13 accurate. He didn't sign anything to say these are accurate
14 statements. It wasn't his job.

15 This is a management certification. This is not
16 something Bill Taylor signed or had anything to do with.
17 Urbizo told you the same thing. He didn't know anything about
18 accounting, not because he's dumb or he doesn't know anything
19 about business. Because it's not his field. It's a
20 complicated field. People get degrees in it. This was not
21 Bill Taylor's field. It wasn't his job.

22 He also didn't sign the management representation
23 letters. And this is very important. He is accused of making
24 all of these misrepresentations and he didn't even sign the
25 representation letters that the government spent so much time

KBDQpet4

Summation - Mr. Burck

1 on.

2 Now, you remember those letters? Certain executives
3 of MiMedx certified financials were in compliance with GAAP.
4 That's what it said. In Q2 2015, no Bill Taylor. In Q3 2015,
5 no Bill Taylor. And for the whole year, no Bill Taylor.

6 Mr. Urbizo again said it very plainly:

7 "Q. So he was not part of the management making those
8 representations to you and your colleagues, right?

9 "A. That's right."

10 Now, the government spent quite a bit of time
11 yesterday on a meeting that happened in February 2016 after
12 Mark Andersen had reported concerns about revenue recognition
13 issues to the company and Cherry Bekaert sat down with various
14 people from management, including Bill Taylor and Pete Petit.
15 You heard some testimony about that. Now, I want you to go
16 back to Matt Urbizo's testimony and think about it. Because he
17 was there. He was at that meeting. Did Bill Taylor prepare
18 the memo that was the subject of that meeting? What did Matt
19 Urbizo tell you?

20 "It's your understanding that Mr. Senken compiled the
21 information that's included in this email, correct?

22 "A. Yes."

23 And Mr. Taylor may very well have been sitting there,
24 but Mr. Urbizo -- and think back to the testimony -- didn't say
25 one word, not one word about what Bill Taylor did, said, asked

KBDQpet4

Summation - Mr. Burck

1 about. Nothing. Not a word.

2 Let's talk about the revenue recognition memo. You
3 remember this memo. This is one that Bill Taylor wrote. The
4 government talked about this. The government probably thinks
5 that we're probably going to run away from this, you know, we
6 can't explain this, he talks about revenue recognition. Wrong.
7 It's about a page long. The title says it all: Revenue
8 Recognition Basics. It's exactly what it says it is. It's a
9 summary of the basics on revenue recognition. And that's what
10 Bill knew about. He knew the basics, or he thought he knew the
11 basics. Does this one-page document -- think back to the
12 testimony from Mark Andersen and from Matt Urbizo. Does this
13 one-page document have all the detail and all the nuance about
14 GAAP and all the other issues of revenue recognition and other
15 issues related to it? No. It basically comes down to the two
16 lines in a one-page memo. Bill didn't know one-tenth -- and I
17 may be even overestimating, one-tenth of what Mark Andersen or
18 Matt Urbizo knew about accounting. And that's not surprising.
19 It wasn't his job.

20 Now, Bill thought that he had a grasp of what these
21 terms meant from a layman's perspective, from a common sense
22 perspective. And what you're going to see is that everything
23 he did, everything he was aware of was consistent with a common
24 sense understanding of these rules.

25 So, before we go into the specific transactions, I

KBDQpet4

Summation - Mr. Burck

1 just want you to keep in mind his limited knowledge, his
2 limited role, and his limited responsibilities, because that
3 helps put in context everything that he did, and it helps you
4 understand one of the most critical things, maybe the most
5 critical thing in this case from Bill Taylor's perspective,
6 which is that he acted in good faith. He did his best. And
7 you're going to hear from Judge Rakoff about the good faith
8 defense on Monday. Let's just briefly read it to you.

9 In this regard, let me advise you that a defendant's
10 good faith is a complete defense to both of the charges in this
11 case. If the defendant you are considering believed in good
12 faith that he was acting properly, even if, even if he was
13 mistaken in that belief, and even if others were injured by his
14 conduct, there would be no crime.

15 You have to keep that in mind as you think about the
16 evidence in this case and when you deliberate.

17 At bottom, every decision that Bill Taylor made was a
18 good faith business decision. It was not an accounting
19 decision.

20 Let's go to CPM, the first transaction in the
21 chronology. This, of course, is the transaction you've heard a
22 lot about involving the \$200,000 to Mark Brooks. There are two
23 parts of this that are relevant to Mr. Taylor: One is the
24 \$200,000 payment and the second is the swap issue.

25 I'm going to start with the \$200,000 payment. Now, I

KBDQpet4

Summation - Mr. Burck

1 know you've heard a lot about it so I'm going to try not to
2 re-tread old ground, but you have to keep in mind the evidence
3 showed a history between CPM and MiMedx that is vital to
4 understanding how things played out and how Bill Taylor thought
5 about the situation. There were all kinds of disputes between
6 CPM and MiMedx. These list some of them. Again, I'm not going
7 to rehash old ground that Mr. Menchel went over, but this long
8 history led up to June 2015, and Bill Taylor's job is to try to
9 resolve the disputes between MiMedx and CPM. But -- and you
10 heard this from a number of people -- not only was there bad
11 blood between CPM and MiMedx, there was really, really bad
12 blood between Mark Brooks and Bill Taylor. In fact, you heard
13 testimony that Bill Taylor didn't like Mark Brooks but Mark
14 Brooks hated Bill Taylor. In fact, a question to Jeff Schultz:
15 "Q. In fact, you understood Brooks hated Bill Taylor by June
16 of 2015, correct?

17 "A. Yes."

18 Hate is a strong word, but it was used a few times
19 with respect to this relationship.

20 Now, in Q2 of 2015, June 2015, Bill tried to close the
21 deal with CPM working with somebody who was not Mark Brooks.
22 It was Bill McLaughlin, who was the CFO of the company. And
23 you saw Bill's final offer. This is on June 24 of 2015. This
24 is before the deal on the \$200,000 and the stock. This is
25 before the deal.

KBDQpet4

Summation - Mr. Burck

1 Bill Taylor says that CPM will place the \$2 million
2 order in a mix that MiMedx can ship by June 30, 2015. This is
3 June 24. He's talking about an order that you're going to hear
4 about again after the deal is agreed. Then you see additional
5 terms that he's talking about, "the overall relationship MiMedx
6 will pay CPM a 25 percent override in the sales to Universal
7 Instrumentation starting July 1, 2015. In Texas, MiMedx will
8 give CPM visibility to hospitals we are working with to join
9 GPO contracts." You heard about the GPO contracts these
10 business disputes they were having.

11 Bill is trying to close the deal. He's trying to get
12 the deal done. There is also a consulting agreement, an
13 amendment to a consulting agreement. You heard testimony that
14 there'd been a long-standing consulting agreement between Mark
15 Brooks and the company and MiMedx for a long time, and it was
16 amended.

17 Bill Taylor here throws out a new proposal.
18 "companies shall pay to consultant an hourly rate of a thousand
19 dollars for monthly meetings relative to duties described in
20 section 2." This is the idea he has. This was Bill Taylor's
21 final offer. And you know, because you heard about it from a
22 number of people in this case, it didn't work. Mark Brooks
23 said, "No way, no how, I'm not doing it."

24 You also know from the testimony that as of the next
25 day after this initial email, this email that tries to

KBDQpet4

Summation - Mr. Burck

1 summarize the deal, as of June 25, Bill Taylor is not running
2 the negotiation. He stepped back from the negotiation. These
3 were texts that you were shown during the trial. Bill Taylor
4 to Mike Carlton and Jeff Schultz, "Our hands are tied. He
5 needs to call Pete and discuss."

6 Bill Taylor a few minutes later, "Maybe he and Pete
7 can find a different way to handle."

8 And before we move on, I just want to step back again
9 briefly just to give you more context. And you saw this at the
10 trial as well. Back in the first quarter of 2015, so some
11 months before this happened, Bill was also trying to deal with
12 CPM because, as we talked about and as you heard at the trial,
13 long-standing bad blood. Back in February of 2015, Bill Taylor
14 is sending an email to a bunch of people in MiMedx saying, "We
15 can do all this" - about CPM orders - "but we need to start
16 planning for zero from him." So Bill Taylor is thinking this
17 relationship may not last. It may not be worth it. We may
18 have to think about going to zero on this guy.

19 And then you see again the Q2 2015 email. And you saw
20 Mr. Menchel brought this up as well. June 24, 2015, "If this
21 doesn't work for them"- them being CPM/Mark Brooks - "then I
22 guess he is choosing to discontinue doing business with us and
23 we will deal with it. We are going way above and beyond."
24 That's what Bill Taylor says. And he meant it. And it didn't
25 work. And Mark Brooks hated him. And he couldn't get the deal

KBDQpet4

Summation - Mr. Burck

1 done, and so he stepped back. He stepped back.

2 The next day after he stepped back was the first day
3 the \$200,000 payment comes up. And recall Jeff Schultz's
4 extensive testimony about this, he says that the call was
5 between Pete Petit and Mark Brooks. Nothing about Bill Taylor.
6 In fact as he said:

7 "Q. And Bill Taylor wasn't on the call, right?

8 "A. From what I gather, no."

9 No evidence that he was on that call.

10 And what did Bill Taylor do when he learned about the
11 200K? We know when he learned about the 200K because we've
12 seen this document. He was confused. I want to spend a moment
13 on this email because this email is very, very important. This
14 is something Mr. Menchel talked about.

15 This is an email that starts as one from Lexi Haden,
16 the general counsel of the company, attaching a draft of the
17 Brooks agreement. Bill Taylor responds to that email from Lexi
18 Haden and says, "I thought we needed him to forego the stock
19 from June 11 of this year for the 200 K?" Question mark? Now,
20 using your common sense, somebody asks that question, does it
21 not imply that they believed that the 200K was meant to be
22 replacement for the stock? You could just read on your own.
23 That's the question he asked. This is when Bill Taylor found
24 out about the 200K and keeping the stock. That's the question
25 he asked in response to the email from Lexi Haden.

KBDQpet4

Summation - Mr. Burck

1 And who answered Mr. Taylor's question? Both Pete
2 Petit and Mike Carlton answered his question. And they both
3 gave very similar answers. Mike Carlton said, "This is an
4 agreement to let him keep it based on lost business." You heard
5 Michael Carlton said the "it" referred to the stock regardless
6 of whether it referred to the stock or 200K, whatever it was
7 talking about, this deal, it was answering Bill's question.

8 Pete Petit, "Both given to avoid going through all
9 hospital contracts in detail and giving a rebate or override."
10 The point being and this is what Bill Taylor was told and he
11 understood and had no reason to disbelieve, this was being done
12 to settle a business dispute. That's what he understood. In
13 fact, the evidence, as Mr. Menchel took you through it, that
14 was one hundred percent true. But Bill had no reason to think
15 there was anything wrong at all with this deal. He thought
16 that maybe they were settling a business dispute, which is what
17 he was trying to do right before, before he had to step back.
18 And the fact that it's in a consulting agreement, what evidence
19 in the record is there that Bill Taylor would be like, "Oh,
20 well, we can't do it that way." There is no evidence like
21 that.

22 Now, was this wrong as an accounting matter? You know
23 who doesn't know the answer to that question? Bill Taylor. No
24 idea.

25 Now, the government tried in various ways to make this

KBDQpet4

Summation - Mr. Burck

1 seem very nefarious, really ugly, shady, shady payment. And
2 the way they did it was interesting. They had Jeff Schultz get
3 up there and they had him talk about this: "We're going to
4 funnel the money through Bill Cochrane. 200K. What do you
5 think, Bill?" Bill said according to Jeff Schultz, "Let me
6 think about it." And then a few days later he told him --
7 Schultz testified to all this -- "let's not talk about it any
8 more." The government wants you to think that because Jeff
9 Schultz, Jeff Schultz brought this idea to funnel money through
10 a third party to Bill Taylor, and then Bill Taylor said, no
11 we're not going to do that, that somehow Bill Taylor is guilty
12 of this crime, this alleged crime. Jeff Schultz brought it to
13 Bill Taylor. Bill Taylor said no, and they want you to think
14 that Bill Taylor is somehow guilty because he heard something
15 from Jeff Schultz which he refused to follow up on and then
16 told him no, we're not doing that. Does that make any sense?

17 I also want to touch on the idea that with respect to
18 this CPM transaction that Bill Taylor had something to do with
19 hiding this payment from auditors. It's preposterous,
20 honestly. Now, Mr. Urbizo told you that the accounting
21 department in MiMedx was his contact, John Cranston, Mike
22 Senken, and accounting knew, they knew about the \$200,000
23 payment, and they knew about the consulting agreement. MiMedx
24 accounting knew about both. The evidence in the trial showed
25 that. Lexi Haden, the general counsel, told them. Remember

KBDQpet4

Summation - Mr. Burck

1 this email? Lexi Haden, Bill Taylor, Pete Petit, Mike Senken,
2 John Cranston: "Money for Mark Brooks." That's the subject
3 matter of the email from the general counsel.

4 "Hi. We need to pay Mark Brooks for the \$200,000
5 consulting fee per the attached final agreement." And the
6 final agreement has an attachment which has a \$200,000 payment.
7 The accounting department in MiMedx who's responsible for
8 providing information to the outside auditors had this
9 information.

10 Now, again, if this was not done properly in terms of
11 an accounting perspective, you know who didn't know about that,
12 who wouldn't have known about that? Bill Taylor. No clue.
13 And if accounting didn't tell Cherry Bekaert about the
14 consulting agreement and about the payment for \$200,000 that
15 they had from the general counsel of the company, the top
16 lawyer at the company, well mistakes happen, but this one was
17 not made by Bill Taylor.

18 Now, just to digress briefly about Cherry Bekaert.
19 Mr. Urbizo, I'm sure, is a fine person, probably a very good
20 accountant, but he admitted on cross-examination that there was
21 some stuff he just missed. Do you remember the testimony, the
22 cross-examination my colleague Mr. Packard did on him where he
23 showed him that Cherry Bekaert actually did find out about the
24 Brooks consulting agreement? It was actually referenced. This
25 was an email on the side. It's from John Cranston to Allison

KBDQpet4

Summation - Mr. Burck

1 Pearson, who is at Cherry Bekaert. He forwards it on to
2 Matthew Urbizo, and the text of the email it expressly
3 references a consulting agreement. Now, Cherry Bekaert may not
4 have followed up, and again, I don't think that's for any
5 nefarious reason. It was a mistake potentially, but Urbizo got
6 this, and if he thought it was important, he missed it.

7 We also showed Mr. Urbizo the work papers, the work
8 papers, their own papers from Cherry Bekaert that showed that
9 he got stock, stock from the company. Remember, he talked
10 about that would be something to be concerned about?
11 Distributor pool, it's highlighted. Listed Mark Brooks 15,000,
12 2,455, and it even shows the forfeiture of those stock later on
13 when they canceled the relationship with CPM. He missed this
14 too. People make honest mistakes. It doesn't make it a crime.
15 It doesn't make them criminals.

16 Now, let's talk about the swaps. Again, nothing
17 nefarious here. Still on CPM and the swaps. That's the second
18 part of supposedly what Bill Taylor did wrong.

19 Now, let's go back to Mr. Urbizo again. Do you
20 remember that Mr. Packard, my colleague, walked him through a
21 spreadsheet, this spreadsheet, and there's a whole bunch of
22 product swaps and product exchanges that he saw, that he
23 received, that he knew about? And these product exchanges were
24 called even exchanges, meaning they're revenue neutral: Same
25 money in; same money out. That's how Jeff Schultz put it.

KBDQpet4

Summation - Mr. Burck

1 Testified to that.

2 And this is very important because Jeff Schultz saw
3 this as revenue neutral: Same money in; same money out. No
4 big deal. He's a non-accountant like Bill Taylor, and both
5 Jeff Schultz and Mike Carlton thought exchanges are different,
6 different from returns. Jeff Schultz said:

7 "Q. Fair to say that in 2015, you viewed product exchanges as
8 being different than product returns?

9 "A. Yes." That makes sense from a common sense perspective.

10 Now, if Jeff Schultz was wrong about that, Mike
11 Carlton was wrong about that, Bill Taylor was wrong about that,
12 and Pete Petit was wrong about that, well, they're not experts
13 on accounting. They don't know GAAP rules. They weren't
14 trained in GAAP analysis. Matt Urbizo knows that, but he's an
15 expert. Bill Taylor is not an expert. He's not even close to
16 an expert. There's no evidence that he knew anything more than
17 what he saw in that revenue recognition memo.

18 Product swaps were no big deal at MiMedx. They were
19 no big deal. That helps explain why nobody thought there was
20 anything wrong with discussing a possible swap upfront with
21 CPM. They did swaps all the time. Bill didn't think it was
22 wrong. No one else thought it was wrong. There were all sorts
23 of emails you saw in this trial where people were talking about
24 it openly. It wasn't hidden. Nobody was hiding the fact there
25 was going to be a swap. In fact, the swaps were talked about

KBDQpet4

Summation - Mr. Burck

1 before they even had the \$200,000 deal. This is June 24.

2 You've seen this email before. Very briefly, they're talking
3 about a swap. Everyone was open about it.

4 After the order, after the deal was struck between
5 Pete and Mark Brooks, they continued to talk about it openly.
6 Mark Diaz to Bill Taylor, Pete Petit, Mike Carlton, very
7 importantly, Michael Senken, Al Evans, John Cranston, all in
8 accounting. What does it say? "CPM PO received." The PO was
9 a result of the deal struck between Pete and Mark Brooks
10 received. June 29, 2015. "mix needs adjustment on the PO
11 (Reference earlier email)." Seems pretty straightforward.
12 Doesn't seem very criminal. Doesn't seem like people were very
13 concerned about this. And they weren't because this was
14 normal. Nothing unusual about this.

15 Lots of people were involved. Lots and lots of people
16 were involved in the swaps.

17 Schultz texts with Bill Taylor, you saw these texts.

18 "I got the PO. Just leaving Brooks' office. I am
19 wondering if the beating I took is worth it. I sure hope it
20 is. I defended our flag."

21 Bill Taylor, "Did we get the right mix?"

22 "We are working it out. Just talked to Diaz. Brooks
23 understands ship what we can and we'll exchange it out later.
24 Diaz will work it out with Sherron on Monday."

25 Does that sound like a criminal conspiracy people are

KBDQpet4

Summation - Mr. Burck

1 doing something shady and didn't want to talk about it?

2 Carlton told Schultz the same thing. He said that
3 "CPM could remix the next quarter." Same day, June 29.

4 The evidence showed that Schultz didn't think there
5 was anything wrong with this at the time. He changes when he
6 was sitting up here, after the government had however many, 10,
7 20 meetings with him. But is there any evidence he thought so
8 at the time?

9 Remember him joking around, remember those texts that
10 my colleague took him through? Jeff Schultz, same day,
11 June 29: Bill Taylor to Mike Carlton: "Sherron won't make a
12 move unless she hears from Brooks or Bill. A lot like me with
13 you. LOL. Now that made you smile. Smiley face. Smiley
14 face."

15 This is business as usual, folks. That's it. Nobody
16 actually thought that what they were doing was wrong at the
17 time.

18 And you know that for another reason. Because Jeff
19 Schultz a year and a half later in an unrelated deal did
20 something very, very similar. Jeff Schultz, December 28, 2016,
21 about a year and a half after all of this, he writes to a
22 differ customer, "Thank you so much for the purchase order
23 yesterday. We need you to make a few slight changes to the PO
24 so we can process it today." Yesterday they get the PO. Today
25 we're making some changes.

KBDQpet4

Summation - Mr. Burck

1 Number 3 highlighted, "Remove AmnioCord from the PO,
2 and we will ship it in January due to low inventory. If you
3 can increase other amounts of the other product to equal 31K
4 from AmnioCord, that would be great. We will swap out that
5 product for AmnioCord in January." An upfront swap which you
6 heard testimony, oh, that was really, really terribly unusual.
7 Here is one for you right there.

8 Same sort of deal. Change your order, substitute
9 products when you got to ship, swap later.

10 Now, what about the Brent Miller email? This is the
11 smoking gun that Mr. Hartman talked about yesterday. Smoking
12 gun, he said, yesterday. The rhetoric, smoking gun. Let me
13 adopt the rhetoric for a moment. This isn't a gun. It's not
14 smoking. And if it were, Mr. Taylor didn't hold it, and he
15 didn't fire it. How do you know that? He's not even on the
16 email. This is the smoking gun, folks. None of the people on
17 this email are sitting here in court as defendants. Bill
18 Taylor is not on it. Pete Petit's not on it.

19 Second, what's so stunning and horrible about this
20 email? Well, it talks about staggered shipment of exchange
21 products to CPM. "bill wants to ship the CPM replacement
22 product in August over a two to three week period in four
23 shipments." But that is standard practice and you heard about
24 that at trial. You heard about that at trial.

25 Schultz:

KBDQpet4

Summation - Mr. Burck

1 "Q. Does that refresh your recollection that MiMedx would wait
2 to ship exchange products until it had sufficient inventory to
3 fulfill new customer orders?

4 "A. Yes."

5 Schultz also told you that for the same reason, the
6 same reason, they'd ship in installments just like proposed
7 here.

8 "Q. For these same inventory management reasons, sir, fair to
9 say MiMedx would also ship exchanged product in installments
10 meaning smaller orders over time as opposed to one big
11 shipment?

12 "A. I would think so" was his answer.

13 This is standard inventory management, this smoking
14 gun.

15 Third, the idea that anyone at MiMedx could just sort
16 of pull a fast one and time the exchange to avoid auditors from
17 learning about it is just dead wrong. Urbizo testified that
18 regardless of when an exchange took place, the auditors learned
19 about it during their audit. You saw the long list of
20 exchanges.

21 (Continued on next page)
22
23
24
25

Kbd3pet5

Summation - Mr. Burck

1 MR. BURCK: (Continuing) There is no evidence that a
2 swap could be hidden. Nothing in the record that a swap could
3 be hidden. This was going to be known, regardless.

4 Fourth, what about this line "No more e-mails on this.
5 Let's meet." That sounds suspicious. That sounds really
6 nefarious. That's what the government wants you to think.
7 Well, let's look at the e-mail that's responding to. David
8 Nix, who works at MiMedx, to Mark Diaz and Brent Miller,
9 exchanges and returns. "Mark, has it been discussed how the
10 distributor returns will be managed. Financial versus
11 non-financial has an impact of what can be done with the
12 tissues that are returned." Then he goes on to list four
13 different issues. CPM EpiFix, CPM Q2 exchange, Arthomed,
14 Alphatech.

15 The response. Mr. McLeod, can you show the top
16 e-mail. "We can discuss this Monday afternoon. Set up a
17 meeting. We have to manage timing for two reasons, our
18 inventory rebuild and revenue recognition issues. We have
19 auditors in here the end of July looking at the books. No more
20 e-mails on this, let's meet."

21 In your experience, when you're talking about
22 something complicated, are you going to write everything on
23 e-mail? Or do you sometimes discuss it in person. Does that
24 happen on occasion. I think this is too complicated to write
25 about in an e-mail, let's talk about it. Does this happen to

Kbd3pet5

Summation - Mr. Burck

1 you?

2 Let's go to the last point. This goes to the last
3 point. As I mentioned, nobody on this e-mail is in this
4 courtroom sitting as a defendant. Neither of these two men are
5 on this e-mail. There is no evidence in the record, other than
6 this e-mail, about what these three men meant by this e-mail.
7 None. What was Mr. Miller talking about? What did he mean?
8 The government wants you to hear smoking gun and say, okay,
9 this is it. This is where I get these guys. But, if you look
10 at the e-mail, and you use your common sense, I don't think
11 you'll see anything much of anything, other than an e-mail that
12 three people exchanged, and they are the ones who know what
13 they meant.

14 Most critically, and I'm going to close on CPM and
15 move on to the last three transactions. Most critically,
16 ladies and gentlemen, don't forget what Jeff Schultz, who was
17 no friend of Bill Taylor or Pete Petit in this trial, what he
18 said. A series of questions that my colleague asked him at the
19 end of his cross-examination.

20 "Q. During that half a decade," this is the period of time
21 they worked together, Bill Taylor and Jeff Schultz, "where you
22 worked with Bill Taylor, he never told you to lie to MiMedx's
23 accountant Mr. Schultz, did he?

24 "A. No.

25 "Q. He never told you to hide any information from MiMedx's

Kbd3pet5

Summation - Mr. Burck

1 accountants, did he?

2 "A. No.

3 "Q. He never told you to lie to MiMedx's auditors?

4 "A. No.

5 "Q. He never told you to hide information from MiMedx's
6 auditors?

7 "A. No.

8 "Q. He never told you to delete your e-mails, delete your
9 texts, shred documents?

10 "A. Not that I can remember."

11 I want to move on to SLR. And I want to talk a bit
12 about it. I mean a bit. Because SLR, very hard to understand
13 exactly what that has to do with Bill Taylor, but I'll try.
14 The government focuses on the Torpin loan, this personal loan
15 from Pete Petit's family to Jerry Morrison. Now, if you think
16 back, you're probably wondering what does that have to do with
17 Bill Taylor. Nothing. There is no evidence, not a document,
18 not a word spoken by a witness, not an e-mail, nothing,
19 nothing, connecting Bill Taylor to that loan. Nothing. That
20 loan, ladies and gentlemen, has nothing to do with Bill Taylor.

21 How about the rest, how about the rest about SLR.
22 Well, Jerry Morrison clearly didn't, couldn't pay for this and
23 he had to -- you know, he's, he couldn't make this order.
24 Well, let me say, how many people at MiMedx knew that?
25 Everybody who knew Jerry Morrison? Dozens of people? Who

Kbd3pet5

Summation - Mr. Burck

1 didn't know that Jerry Morrison had worked at MiMedx and was
2 now taking over as one of the biggest distributors in Texas?
3 So that's the crime? That's his intent? What everybody else
4 knew? That Jerry Morrison was taking over? Your common sense
5 probably tells you that doesn't make a lot of sense.

6 I'm going to go over to Stability, and I'm going to be
7 even briefer on Stability. Brian Martin testified for hours
8 and hours about Stability. Now, Brian Martin is a confessed
9 liar and fraudster, so, not sure how much stock you can put in
10 his word. Probably not much, as Mr. Menchel very ably
11 demonstrated. But even putting that aside, Bill Taylor barely
12 came up at all in that entire testimony. He was barely
13 mentioned at all. And you know what is really telling?
14 Mr. Hartman yesterday when he gave his summation, do you know
15 how many times he mentioned Bill Taylor with respect to
16 Stability by name? Zero. Not once. Didn't mention him a
17 single time by name. And that's for a single reason. There is
18 no evidence in this record, not a document, not a human being,
19 nothing, that would connect Bill Taylor to the letter that the
20 government complains about, the letter that was dated
21 September 25 that gave the right of return that Pete Petit
22 sent. Nothing connecting Bill Taylor to that. No knowledge of
23 it, nothing. There is no evidence that Bill Taylor knew
24 anything about the phone calls that were allegedly happening
25 between Mr. Martin and Mr. Petit. Nothing. Not a single

Kbd3pet5

Summation - Mr. Burck

1 person, document, nothing. Not even Mr. Martin. And there is
2 no evidence that Bill Taylor knew anything about this
3 alleged -- by Mr. fraudster, liar, Mr. Martin -- that he didn't
4 want the product. Nothing.

5 So even if he you believe him, he didn't say that Bill
6 Taylor knew anything about it. There is no documents to
7 suggest he knew anything about them. There is nothing at all
8 in the evidence that Bill Taylor for some reason was, like, oh,
9 this distribution agreement is a problem because, of course, as
10 Mr. Urbizo testified multiple times, you don't need a
11 distribution agreement to have a deal. You can use the PO.

12 Mr. Taylor appears at Stability only at the very
13 beginning, when everybody was excited -- remember those e-mails
14 that you saw at trial with Mr. McLaughlin, or sorry --
15 Mr. Johnston, Tom Johnston being excited about being a
16 distributor for MiMedx and Mr. Martin being excited. He was
17 involved then, and then he was involved at the very end when
18 the distribution agreement was signed. Nothing in between.
19 Not a peep about Mr. Taylor.

20 I'm going to close on First Medical. There is more to
21 talk about with First Medical than certainly with Stability and
22 certainly with SLR.

23 Couple big picture points about First Medical. First
24 of all, unlike what the government's alleging with some of
25 these other orders, there is no allegation that the First

Kbd3pet5

Summation - Mr. Burck

1 Medical order was a fake order or was somehow some kind of like
2 trickery. Nothing. The evidence was that First Medical is a
3 real company, out of Saudi Arabia, that was doing a lot of
4 business with MiMedx. That wanted to do more business with
5 MiMedx and had done some big deals with MiMedx and they wanted
6 to do another order. That's the evidence of the case. This is
7 not one of the so-called fake orders they are talking about.

8 You heard from Mr. Carlton about this. Mr. Carlton is
9 really the evidence for the government against Mr. Taylor about
10 First Medical. It is really about what he testified. But
11 Mr. Carlton told you that:

12 "Q. If it hadn't been for the revenue target or the quarterly
13 revenue figure, when would that sale to First Medical more
14 naturally have taken place in relation to the tender?

15 "A. Sometime at the end of the first quarter, or maybe more
16 over the second quarter, potentially, after the bid had already
17 took place."

18 What he is talking about is the order in the fourth
19 quarter of 2015, the question was, would that happen, would
20 that have happened in the fourth quarter. He says no, but it
21 would have happened probably first quarter, maybe second
22 quarter. We are talking about a difference of about a month.
23 December, January. January is the beginning of the first
24 quarter. So there is no question here we are talking about a
25 real order, even from Mike Carlton's perspective.

Kbd3pet5

Summation - Mr. Burck

1 You also know that First Medical could pay. They had
2 a letter of credit from a bank. Mr. Carlton testified about
3 that. The only question was when they would buy the product.
4 When they would take the product. Now, you heard a lot from
5 Mike Carlton about what he remembers about these negotiations
6 with First Medical. He gave you his opinions about what other
7 people thought and what he believed they meant five years ago.
8 But we all know that Mike Carlton is not a mind reader. And we
9 also know this is the same Mike Carlton who used the word
10 "wrongful" and "wrong" multiple times in his examination when
11 it suited him.

12 Here's some examples. He was talking about what I did
13 was wrong with the inflating the revenue, and hiding stuff from
14 the auditors, I thought the transaction was wrong at a certain
15 point.

16 But then when it didn't suit him, when I was asking on
17 cross-examination:

18 "Q. Back in 2018, Mr. Carlton, isn't it true that you did not
19 believe that the December 2015 transaction involving First
20 Medical was wrong?

21 "A. I don't remember saying that, no.

22 "Q. You don't remember saying that, but what did you believe?
23 What did you think then? You didn't think it was wrong, right?

24 "A. What do you mean -- can you please clarify what wrong
25 means."

Kbd3pet5

Summation - Mr. Burck

1 This is this was Mike Carlton. Wrong, I know what
2 wrong is when the government is asking me questions. But when
3 defense counsel for Mr. Taylor or Mr. Petit asks, I don't know
4 wrong. Wrong? You tell me what wrong means. So let's,
5 instead of focusing on the unreliable witness, to put it
6 politely, of Mr. Carlton. Let's look at what the document
7 says. And let's go to the two e-mails that the government says
8 show Mr. Taylor's criminal behavior.

9 The first one is the deal, that's the one that the
10 government says was the cover story, and the second one we call
11 the relationship e-mail. I want to explain that to you. They
12 think that's the side deal, the real story.

13 Were they sent four seconds apart? They sure were.
14 You know why? What does the evidence tell you. He was writing
15 them to the same person, Bassam El Hage, and it was about the
16 same order. The same transaction. The first, the deal, this
17 is one that the government claims was some kind of false cover.
18 You remember Mark Andersen testified that he went, when he
19 learned something was off about First Medical from his
20 perspective, he went and talked to Bill Taylor about it. Bill
21 Taylor here fixes the problem that Mr. Andersen raised with
22 him. The issue was he wanted a set term. He wanted 180 days
23 from the receipt of the product by First Medical. That's what
24 Mr. Taylor got from Mr. Bassam El Hage. 180 days. That's what
25 ended up in the PO.

Kbd3pet5

Summation - Mr. Burck

1 The second e-mail, which he sent a few seconds later,
2 this discussed the relationship between MiMedx and First
3 Medical. And Mike Carlton, of all people, told you that all
4 customers that MiMedx had were partners. They're meant to be
5 partners. Now, what were the three things in this e-mail that
6 the government has an issue with. There it is. Highlighted.
7 Remember the tender was discussed by Mr. Carlton, the tender
8 was going to, they thought would issue in March of 2016. And
9 all this was around that question of the tender.

10 Mr. Taylor writes to Bassam El Hage, "In the event
11 that the tender is delayed or for some unlikely event it does
12 not occur, MiMedx will give First Medical additional extended
13 payment terms, if requested, and will assist First Medical in
14 selling the product or another option would be to repurchase
15 the product."

16 So there are three things that the government is
17 concerned with. One is the possibility, the possibility of
18 extended payment terms; second is the possibility of helping
19 them sell the product; and third is this alleged possibility of
20 a right of return. Well, let's look at each of these.

21 The payment terms first. You heard testimony and you
22 saw documents that showed that people, customers were late all
23 the time. All the time. This is Mark Andersen himself:
24 "Yes, it was not uncommon to have customers at MiMedx to pay
25 late?

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Summation - Mr. Burck

1 "A. Yes, there were many customers who were paying late. Yes,
2 that's true."

3 Extended payment terms routinely provided to
4 customers. You saw this chart, there are literally thousands
5 of payments that are longer than 90 days. 120 days 150 days,
6 almost 3,000, 300 plus days, this is not unusual. There is
7 nothing strange about that. That was common. It was helping a
8 relationship with a client. It's his job to help customers to
9 make them -- to be flexible.

10 How about the promise to help sell product. Well,
11 remember, there is a history of First Medical and MiMedx
12 working together to help First Medical sell product. To Mike
13 Carlton:

14 "Q. You wanted to help them sell product in the market; is
15 that what you said?

16 "A. Yeah, we supported all customers through education and
17 helping them sell, yes.

18 "Q. Including First Medical, right?

19 "A. Correct."

20 We supported all customers through education and
21 helping them to sell. Yes. All customers. Anything unusual
22 about First Medical being assisted in this way? No, of course
23 not.

24 If you look at the actual e-mail, right after the
25 criminal sentence, Bill Taylor explains what he means by

Kbd3pet5

Summation - Mr. Burck

1 assisting with selling. "We will continue supporting sales
2 efforts in the territory by continuing training such as what
3 Mr. Frank Burrows and Dr. Thomas Davenport have recently
4 performed and will be performing again in February."

5 What this case really comes down to, what the
6 government really thinks they got Bill Taylor on, is the last
7 part. The option to repurchase. They say that's a right of
8 return. Using your common sense and reading the e-mail
9 yourself, rather than relying on the government, you will see
10 it is not a right of return. It is the opposite of a right of
11 return. Not only did he not use the word "return," he used the
12 word "repurchase." Repurchase. Different word. Different
13 meaning. And it was an option that belonged only to MiMedx, as
14 the seller. The option was something that MiMedx always had.
15 If a customer, any customer, had a problem selling products,
16 MiMedx could, at their option, buy them back.

17 This was about managing the relationship with First
18 Medical. It was customary, it was routine, it was providing
19 flexibility. And he gave MiMedx or MiMedx gave First Medical
20 extended payment terms, if requested, if the delay happened or
21 if the tender didn't issue, like they did everybody. They were
22 helping sell, like they did everybody, and then this was a
23 MiMedx option, belonging solely to them to repurchase. Not
24 First Medical's option.

25 Now think about it. The only party to this deal that

Kbd3pet5

Summation - Mr. Burck

1 could repurchase, repurchase product is the seller, MiMedx, who
2 had sold the product to First Medical in the first place. The
3 buyer doesn't have an option to repurchase product. The buyer
4 has an option to resell product. But that's not what it says,
5 it says repurchase. Common sense. Read the e-mail yourselves.

6 Now, everybody at MiMedx believed that the tender was
7 going to happen. That's what they thought would happen. They
8 thought the sale was going to occur. Mike Carlton testified:
9 "Q. From a sales perspective, you thought that that tender was
10 probably going to happen, right?

11 "A. From a sales perspective, if the government issued a
12 tender we felt confident we'd win it."

13 They thought MiMedx would get paid. That was the
14 reasonable expectation of everybody. And nobody used the word
15 return, except Mike Carlton. I want to talk about that for a
16 few minutes we have left.

17 During the trial, the government showed you this
18 exhibit. This is a series of texts between Mike Carlton and
19 Bill Taylor. Mike Carlton asked Bill Taylor in the top text,
20 "BT, can you send the e-mail sent to Mr. Majed letting them
21 know they can return if the tender doesn't issue. Send to me."
22 Mr. Taylor then responds back "Just sent." Here's the key.
23 This is a text being exchanged between two people. Normal
24 texting shorthand. The e-mail that Bill sent back to him was
25 about a repurchase, not a return. What did Mike Carlton do

Kbd3pet5

Summation - Mr. Burck

1 with the e-mail that he got from Bill Taylor that showed the
2 repurchase? Did he just forward it on, say here it is? No.
3 He wrote, "Dear Bassam, did this help? MiMedx will return
4 repurchase the inventory if needed. Thanks, Mike."

5 He ad libbed and added "return" to the prior e-mail.
6 "Return repurchase." And Mike Carlton admitted that Bill
7 Taylor never asked him or authorized him to send this e-mail.
8 "You didn't ask Bill Taylor whether or not you could say return
9 or repurchase before you sent this e-mail, did you?

10 "A. I did not, no."

11 So Bill Taylor didn't even know about this e-mail.
12 You remember when I showed Mr. Carlton on the stand, I showed
13 him this, this e-mail, the repurchase language. And I asked
14 him, look at the word repurchase. Do you remember how confused
15 he got? Mike Carlton:

16 "Q. To repurchase a product would require MiMedx to buy it
17 back, isn't that right?

18 "A. I'm assuming so.

19 "Q. You are assuming so or is that what it means?

20 "A. Looking at it now, makes sense to me. At the time I
21 thought Bill meant return, but looking at it now, you have to
22 write a check to purchase the product back."

23 Looking at it now. That's what he said. Sitting
24 there on the stand.

25 Now, another text the government showed you was this

Kbd3pet5

Summation - Mr. Burck

1 one between Mike Carlton and Bassam El Hage. Bill Taylor is
2 not on this text chain. It says, "Also, when the audit letter
3 comes just acknowledge as correct. No need to send them any
4 other information."

5 The prior e-mail mentions that Bill is curious about
6 the tender and Mike Carlton sends this. What did Mike Carlton
7 testify to? He said that Bill Taylor instructed him to send
8 this text, as if Bill Taylor was dictating text language to him
9 in a conference room somewhere. Now, again, does that make
10 sense to you? That Bill Taylor is standing right next to him
11 and saying send this text to Bassam El Hage this way. His name
12 doesn't appear in that text. But remember that last e-mail
13 that Mike Carlton admitted that he didn't get approval from
14 Bill Taylor to send. He ad libbed it.

15 Here, what makes more sense, that he ad libbed this or
16 did Bill Taylor say, say exactly like this. I want to make
17 sure you put it this way.

18 Again, use your common sense and make your own
19 conclusion about what makes more sense.

20 THE COURT: Counsel, how much more do you want?

21 MR. BURCK: I think I can finish in five.

22 THE COURT: Very good.

23 MR. BURCK: Let's turn to the audit confirmation
24 letter. This is the letter that supposedly is hiding
25 information from the auditors because it doesn't list payment

Kbd3pet5

Summation - Mr. Burck

1 terms. Doesn't say anything special about anything beyond
2 what's in the PO. Well, that's for a good reason because there
3 wasn't anything special about what was in the PO. It was what
4 it appeared to be. Didn't mention a right of return because
5 there was no right of return. Didn't mention extended payment
6 terms, because there weren't any at that point. Remember, this
7 audit letter was signed in February of 2016. February 2016.
8 The tender is supposed to hit in March of 2016. You heard
9 testimony from Mr. Carlton that the tender was going to happen
10 then in March 2016. This is before then. None of the options
11 about extending terms or anything else would happen unless, if,
12 if, if, remember what this e-mail says, a problem happens with
13 the tender. So at this point this is all pre.

14 So Bassam El Hage and First Medical, again, there is
15 no evidence in the record about what they thought about any of
16 this, other than what you heard from Mike Carlton. But, we
17 have no reason to think that they thought they had anything at
18 that point. Now, maybe from an accountant's perspective this
19 is wrong. Maybe it's inaccurate. But Bill Taylor, Mike
20 Carlton, and certainly not Bassam El Hage, none of them are
21 accountants, and there is no reliable evidence that these
22 non-accountants knew at the time that when this happened, that
23 this was a problem. The evidence is they acted in good faith.

24 And you will recall that Mr. Carlton testified that
25 Mr. Taylor had asked to see a draft of the audit letter before

Kbd3pet5

Summation - Mr. Burck

1 it went to the accountants, and there was in fact a text about
2 that. But you also heard testimony from Mike Carlton that he
3 admitted that never happened. No one ever received a draft.

4 The last set of texts I want to show you involve this
5 allegation that Bill Taylor told Mike Carlton to just say sign
6 and send for the First Medical audit letter. Now, this in
7 front of you is the government's exhibit that was shown to
8 Mr. Carlton on the stand. These are the texts that they
9 showed, these are all excerpts of texts, and the incriminating
10 texts are at two -- at 11:39:46 a.m. Bill Taylor, Mike Carlton,
11 See if Bassam can send a draft of the signed letter to me prior
12 to him sending to the auditors. Okay. This is separate, just
13 confirm for the auditors. And Bill Taylor, Mike Carlton, no
14 extra commentary, just sign and send. And then okay.

15 That's what they showed to Mr. Carlton, that's what he
16 said, oh yeah, they were talking about First Medical.

17 Well, what did we show you? All those texts in
18 between. And if you look at the texts that immediately
19 precedes the one that says from Bill Taylor, this is separate,
20 just the confirm for the auditors, it's about Athletic
21 Surgical. That's what Mr. Carlton admitted. All the texts
22 that are in yellow are about First Medical. Even the one
23 that's after -- sorry. Athletic Surgical. Excuse me. All
24 Athletic Surgical. Even the one that's after is about Athletic
25 Surgical. All of them. But he wants you to believe that he at

Kbd3pet5

Summation - Mr. Burck

1 12:27:48 when he said "okay" to "no extra commentary, just sign
2 and send," that he was referring back to a text that happened
3 40 minutes before at 11:47:39 a.m., when Mike Carlton and Bill
4 Taylor said "okay," and the text before that is clearly about
5 First Medical. He wants you to think that he wasn't talking
6 about text that was right before. No, no, no, I was harkening
7 back to 40 minutes earlier and saying I'm talking about First
8 Medical. That's what I understood him to be talking about.

9 Use your common sense, folks. You know these texts
10 are about Athletic Surgical, which has nothing to do with this
11 case, and you know that Bill Taylor is telling Mike Carlton,
12 "This is separate, just the confirm for the auditors, no extra
13 commentary" about Athletic Surgical, not about First Medical.

14 I want to conclude -- your Honor, I'll wrap up right
15 now.

16 THE COURT: That's fine.

17 MR. BURCK: I want to conclude with on First Medical
18 with the same thing that I concluded with on CPM with Jeff
19 Schultz. You didn't hear anything about Mr. Taylor lying,
20 telling anyone to lie, to hide anything to conceal anything.
21 Mr. Carlton testified to that.

22 "Q. Now did Mr. Taylor ever tell you don't tell anybody about
23 that deal we have with First Medical?

24 "A. He did not.

25 "Q. Did he ever tell you don't send this e-mail to anybody?

Kbd3pet5

1 "A. He did not.

2 "Q. Did he ever ask you to conceal information from anybody at
3 MiMedx?

4 "A. He did not."

5 Ladies and gentlemen, nobody has testified that Bill
6 Taylor ever told him to lie about anything, to hide anything,
7 because he had no reason to do anything like that, and he would
8 not have done that.

9 On the first day of this trial, my colleague
10 Mr. Weinreb told you that at the end, we would be asking you to
11 return a verdict that is just, that is fair, and reflects the
12 evidence, not the rhetoric of this case. And that's what I'm
13 doing now, ladies and gentlemen.

14 Bill Taylor is not guilty of these crimes. And we ask
15 that you return a verdict that reflects that he's not guilty.
16 Thank you.

17 THE COURT: Thank you very much.

18 Okay, ladies and gentlemen, another full day. On
19 Monday, the government gets its rebuttal summation for 45
20 minutes at the outset, then I will give you my instructions of
21 law, and then the case will be yours to deliberate. So that
22 will be probably late Monday morning.

23 So, now that the pressure is on, have a very good
24 relaxed weekend and we'll see you at 9:45 on Monday.

25 (Jury excused)

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1 THE COURT: Anything any counsel needs to raise with
2 the Court?

3 MR. IMPERATORE: Not from the government.

4 MR. MENCHEL: No, your Honor. Thank you.

5 MR. BURCK: No, your Honor. Thank you.

6 THE COURT: Everyone, have a good weekend. We'll see
7 you 9:30 on Monday.

8 (Adjourned until November 16, 2020, at 9:30 a.m.)
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